No. (1)

Supreme Court, U.S.
FILED

931785 MAY 9 1994

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

Organizacion JD Ltda., and Manufacturas JD Ltda.,

Petitioners,

v.

United States of America, Drug Enforcement Administration, Banco Atlantico, and The Bank of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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159 pp

QUESTIONS PRESENTED

1. Whether the newly enacted requirements under 18 U.S.C. § 2518(7), for "exigent circumstances" to exist, were met by the United States and the Drug Enforcement Administration, thus the disclosing and acquiring of the contents of Organizacion JD Ltda., and Manufacturas JD Ltda., in transit electronic communication is not actionable?

2. Whether the United States, and the Drug Enforcement Administration's use of only verbal orders to procure the programming of "stop ques" into the communication modems of Banco Atlantico and the Bank of New York, to acquire the contents of every third party electronic communications going to the Republic of Colombia between January 1, 1990 through August 26, 1990, including those of

Organizacion JD Ltda. and Manufacturas JD Ltda, was a violation of 18 U.S.C. § 2511(1)(a)?

3. Whether Banco Atlantico and the Bank of New York's programming of "stop ques" in their communication monitoring controls, when no warrant was issued under the Federal Rules of Criminal Procedures, violated 18 U.S.C. §§ 2511(1)(c), 2511(2)(a)(i) and 2511(3)-(a)?

4. Whether Banco Atlantico and the Bank of New York satisfied the "good faith" requirements of 18 U.S.C. § 2707, when without a warrant issued under the Federal Rules of Criminal Procedure they divulged the contents of the electronic communications of Organizacion JD Ltda., and Manufacturas JD Ltda., that were in

electronic storage for less than 180 days?

5. Whether Organizacion JD Ltda. and Manufacturas JD Ltda., as the senders and the intended recipients of three international electronic fund transfer communications, have a cause of action for direct damages against Banco Atlantico and The New York Bank, due to breach of contract?

LIST OF PARTIES

The parties that have appeared in these two cases included those listed on the case caption.

Neither Organizacion JD Ltda., nor Manufacturas JD Ltda., have either parent companies or subsidiary companies.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The United States Court of Appeals for the Second Circuit has again decided important questions under the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510 et seq., which govern the acquisition and disclosure to the United

States of in transit electronic communication; and §§ 2701 et seq., which govern the access and divulging to the United States of electronic communication in electronic storage.

The questions surrounding the interpretation of this federal law has not been, but should be settled by the Supreme Court because of the importance which Congress gave to the privacy of electronic communications.

Thus Organizacion JD Ltda., and Manufacturas JD Ltda., pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered on February 24, 1994.

CITATIONS TO OPINIONS BELOW

The unreported opinion of the District Court for the Eastern District of New York is reproduced at App. 1a.[1]

The February 24, 1994, opinion of the Court of Appeals, not yet reported is reproduced at App. 1b.

The opinion of the United States District Court for the Eastern District in Manufacturas Internacional, Ltda. v. Manufacturers Hanover Trust Co., and Consolidated Cases, 792 F. Supp. 180 (February 27, 1992), appeal pending, 2nd Cir. Docket No. 92-7360, is reproduced at App. 1c.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered

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[1] "App. " references are to the section and page number in the attached Appendix.

on February 24, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

The statutory provisions involved are 18 U.S.C. §§ 2510; § 2511(1)(a) and (c); § 2511(2)(a)(i); § 2511(3)(a); § 2516(3); § 2518(7); § 2520; § 2702(a); § 2703(a); and § 2707. These provisions are reproduced at App. 1d.

STATEMENT OF THE CASE

A. JURISDICTION BELOW

Organizacion JD Ltda., and Manufacturas JD Ltda. (hereinafter "Limited Partnerships"), filed claims for damages on August 5, 1992, based upon the provisions of 18 U.S.C. §§ 2520, and 2707; and under breach of contract.

Appellate jurisdiction is invoked pursuant to 28 U.S.C. § 1291.

B. RELEVANT FACTS

Banco Atlantico and the Bank of New York (hereinafter the "Intermediary Banks"), provide a service to the public for which they receive a portion of every payment made to the FEDWIRE, SWIFT, and CHIPS, world-wide electronic communication fund transfer systems.

On or about July 18, 1990, two Assistant United States Attorneys from the Civil Division of the Office of the United States Attorney for the Eastern District of New York, Mr. Arthur P. Hui and Mr. Gary R. Brown, (hereinafter "Messrs. Hui and Brown"), verbally instructed by telephone the Intermediary Banks to program in their respective computer communication modem devices "stop ques," so to acquire and disclose to the United States the contents of

every third party electronic funds transfer communications in transit going to any third party beneficiary in the Republic of Colombia (App. 13c).

Although the programming of "stop ques" is restricted to the Intermediary Banks communication monitoring system, the Intermediary Banks complied with the verbal instructions, and then transmitted by fax to Messrs. Hui and Brown a copy of the contents of the electronic communication acquired, and placed the information in electronic storage pending instructions.

As explained by a representative of Banco Atlantico during his deposition:

> . . . <u>We got instructions to fax them over every transaction that we got for third-party beneficiaries in Colombia</u> . . . . What we would do is fax a copy of the transaction to Mr. Hui and then he would, same day of the next day the latest, tell us over the phone, "Okey, you

> are supposed to freeze this transaction as well." And then usually the same day of the day after we would get the [warrant for arrest of article-in-rem]. (emphasis added)

On July 24 and 26, 1990, only because of the use of the "stop ques," the Intermediary Banks acquired the contents of three electronic fund transfers communications purchased in the Republic of Venezuela by the Limited Partnerships. These electronic communications were in transit to the Limited Partnerships' beneficiary bank in the Republic of Colombia. The contents of the electronic communication were immediately disclosed to Messrs. Hui and Brown, to await instructions whether to permit the transmission to proceed.

For sixteen days the Intermediary Banks maintained the information in electronic storage pending instruction.

On August 2, 1990, the Intermediary Banks refused all requests for information regarding the electronic communications of the Limited Partnerships.

Not until August 8, 1990, was the Intermediary Banks served a Seventh Amended In Rem Complaint in United States v. All Funds on Deposit in any Account Maintained at Merrill, Lynch, Pierce, Fenner & Smith, 801 F. Supp 984 (E.D.N.Y. 1992) (Weinstein, J.)(hereinafter "All Funds Case"). In addition, on the same date a Drug Enforcement Administration (hereinafter "DEA") subpoena was served. Both documents named the Limited Partnerships.

The DEA administrative subpoena sought all information from January 1, 1990, maintained in electronic storage at the Intermediary Banks of any elec-

tronic communications belonging to the Limited Partnerships.

The DEA administrative subpoena ordered, "DO NOT DISCLOSE THE EXISTENCE OF THIS REQUEST."

Because the United States and the Drug Enforcement Administration neither sought nor obtained a warrant issued under the Federal Rules of Criminal Procedure within 48 hours of their obtaining access to the contents of the Limited Partnerships electronic communication on July 24, and 26, 1990, the Limited Partnership filed a counterclaim against them when a verified claim was filed.

On February 27, 1994, three days prior to the trial in the All Funds Case, in an associated civil action, Judge Jack B. Weinstein, used the "re-

lation back doctrine," to dismiss Manufacturas Internacional, Ltda., v. Manufacturers Hanover Trust Co., and Consolidated Cases, 792 F.Supp. 180 (E.D.N.Y.), appeal pending, No. 92-7360 (2d Cir. 1992) (hereinafter the "Consolidated Bank Case")(App. 6b and 48c).

On May 8, 1992, after a two-month jury trial in the All Funds Case, the Limited Partnerships' funds were found to be not subject to forfeiture. But Judge Weinstein used the "relation back doctrine" to deny the Limited Partnerships claim for damages under 18 U.S.C. § 2520. Judge Weinstein did not consider the claim for damages under 18 U.S.C. § 2707.

On August 5, 1992, the Limited Partnerships filed the instant action seeking damages under the United States

Constitution, 18 U.S.C. §§ 2520 and 2707, as well as under contract theory.

On December 2, 1992, Judge Weinstein again granted summary judgement based on his previous use of the "relation back doctrine" in both the Consolidated Bank Case and the All Funds Case (App. 6b).

On September 10, 1993, the All Funds Case, was affirmed. See United States v. Daccarett, 6 F.3rd 37 (2nd Cir. 1993), petition for cert. filed, 62 U.S.L.W. 3454 (U.S. Nov. 15, 1993)(No. 93-1020), petition for cert. denied (U.S. March 21, 1994).

In the instant appeal, on February 24, 1994, the Second Circuit vacated and remanded to the lower court the allegation of liability against the United States and the Drug Enforcement Admin-

istration under 18 U.S.C. § 2703 (App. 13b).

However, the Second Circuit affirmed the lower court's decision that there was no civil liability either under the Fourth and Fifth Amendment, based on the lower court's finding of the existence of "exigent circumstances" (App. 8b).

Also the Second Circuit affirmed the lower court's decision that no civil liability existed under 18 U.S.C. § 2520, because the seizures did not constitute `interception' since no "device" was used by the United States (App. 11b).

Furthermore, the Second Circuit affirmed that the Intermediary Banks were not civilly liable under 18 U.S.C § 2707 for a violation of 18 U.S.C. § 2701

because their good faith reliance on an in rem court warrant or order is a complete defense under 18 U.S.C. § 2707-(d)(1) (App. 12b).

Neither the Second Circuit nor the lower court considered the requirements of 18 U.S.C. § 2518(7), or the prohibition in § 2511(1)(a), and § 2702(a).

Finally, the Second Circuit held that no action for breach of contract would lie due to the in rem judicial action (App. 19b).

REASONS FOR GRANTING THE WRIT

I

WITHIN 48 HOURS OF ACQUIRING THE CONTENTS OF THE LIMITED PARTNERSHIPS ELECTRONIC COMMUNICATION, THE UNITED STATES AND THE DRUG ENFORCEMENT FAILED TO COMPLY WITH THE REQUIREMENTS OF 18 U.S.C. §§ 2518(7) AND 2516(3), THUS CIVIL LIABILITY EXISTS DESPITE THE SECOND CIRCUIT FINDING "EXIGENT CIRCUMSTANCES."

In enacting 18 U.S.C. § 2518(7), Congress mandated a new statutory search standard involving electronic communications when alleged "exigent circumstances" exist. This standard is higher than the judicially created standard based on the Fourth and Fifth Amendment. See. United States v. James Daniel Good Real Property, 114 S.Ct. 492 (1993).

Thus when alleged "exigent circumstances" exist involving the obtaining of access to information in electronic

communication, it is the newly enacted standard under 18 U.S.C. § 2518(7), which must be complied with, not the general lesser standard under the Fourth or Fifth Amendments. See §19.5, at p. 373, The Law of Electronic Commerce, Benjamin Wright, Little, Brown and Co. (1991).

The Congressional mandate under 18 U.S.C. § 2518(7), was not even considered by either the Second Circuit or the lower court.

Their only rational for finding "exigent circumstances" was the very nature of electronic communication, that is because the electronic communications at issue were fungible and capable of rapid motion due to modern technology (App. 10b).

This rational lacks merit, and must be reversed.

Under 18 U.S.C. § 2518(7), Congress did provide for the acquiring by the United States of access to in transit electronic communication, without a warrant issued under the Federal Rules of Criminal Procedures, when alleged "exigent circumstances" exist, but only if the following requirements are met:

first, a determination has been made by an "investigative or law enforcement officer, <u>especially designated by the Attorney General, the Deputy Attorney General, the Associate Attorney General</u>";

second, that the authorized determination demonstrates that, "an emergency situation exists that involves:

(i) immediate danger of death or serious physical injury to any person,

(ii) conspiratorial activities threatening the national security interests, or

(iii) conspiratorial activities characteristic of organized crime;"

third, that "there are grounds upon which an order could be entered under [the Federal Rules of Criminal Procedure] to authorize such interception;" and,

fourth, "if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur."

The section further states that, "[i]n the absence of an order, such interception shall immediately terminate

when the communication sought is obtained or when the application for approval is denied, whichever is earlier."

Finally, the section states that, "[i]n the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any . . . electronic communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application."

A cursory review of facts establishes that all the above requirements of 18 U.S.C. § 2518(7), were violated:

First, the Department of Justice confirmed to Congress that the level of

authority required to seek a court order to permit access to electronic communication in transit would be at least Deputy Assistant Attorney General of Criminal Division or higher. See Senate Report No, 99-541 October 17, 1986, at p. 3682 ; House Report No. 647, 99th Congress, 2nd Session (1986) at p. 51. Thus Messrs. Hui and Brown had no authority to issue verbal order to obtain access to the Limited Partnerships' electronic communications.

Second, under the requirements of 18 U.S.C. § 2516(3), and the Federal Rules of Criminal Procedure, no federal judge would have granted a "general warrant" to stop every third party electronic fund transfer communication going to the Republic for nearly 45 days.

Third, the United States never sought an order within 48 hrs. of acquiring the contents of the Limited Partnerships electronic communication.

Therefore, because the Second Circuit failed to consider the mandate of Congress' as enacted in 18 U.S.C. §§ 2518(7) and 2516(3), its decision that no civil liability exists against the United States and the Drug Enforcement Administration based on the Court's finding that "exigent circumstances" existed (App. 8b), must be reviewed.

II

18 U.S.C. § 2511(1)(a) WAS VIOLATED BY THE UNITED STATES, AND THE DRUG ENFORCEMENT ADMINISTRATION PROCURING THE PROGRAMMING OF "STOP QUES" INTO THE COMMUNICATION MODEMS OF THE INTERMEDIARY BANKS SO TO ACQUIRE THE CONTENTS OF EVERY THIRD PARTY ELECTRONIC COMMUNICATIONS GOING TO THE REPUBLIC OF COLOMBIA BETWEEN JULY 17, 1990 THROUGH AUGUST 26, 1990, INCLUDING THOSE OF ORGANIZACION JD LTDA. AND MANUFACTURAS JD LTDA.

In its decision the Second Circuit failed to discuss the alleged liability of the United State and Drug Enforcement under 18 U.S.C. § 2511(1)(a), for the procuring through the use of "stop ques" programmed in the Intermediary Bank computer modems, to acquire of the contents of the Limited Partnerships' three in transit electronic fund transfer communications (App. 13c).

18 U.S.C. § 2511(1)(a), states in pertinent part that "[e]xcept as other wise specifically provided in this chap-

ter any person who . . . intentionally procures any other person to intercept any electronic communication. . . shall be punished."

18 U.S.C. § 2510(4), in pertinent part defines "intercept" as the "acquisition of the contents of any . . . electronic . . . communication through the use of any electronic . . . device."

18 U.S.C. § 2510(5), in pertinent part defines "electronic . . . device" as "any device or apparatus which can be used to intercept a . . . electronic communication."

Because the Intermediary Banks have admitted to programming "stop ques" into their computer modem to stop every third party electronic fund transfer going to the Republic of Colombia based only on the verbal orders of Messrs. Hui and

Brown, the question involved is whether or not the United States and the Drug Enforcement are liable under 18 U.S.C. § 2520, for this acquiring electronic communications by procuring another to intercept the electronic communications?

Therefore Second Circuit's decision must be reviewed since they considered the wrong issue: i.e. whether the United States was liable for using a "device" to "intercept" electronic communication.

III

BANCO ATLANTICO AND THE BANK OF NEW YORK'S PROGRAMMING OF "STOP QUES" IN THEIR COMMUNICATION MONITORING CONTROLS TO ACQUIRE THE CONTENTS OF ALL IN TRANSIT ELECTRONIC FUND TRANSFER COMMUNICATIONS GOING TO THE REPUBLIC OF COLOMBIA, INCLUDING THOSE OF ORGANIZACION JD LTDA., AND MANUFACTURAS JD LTDA., VIOLATED 18 U.S.C. §§ 2511(1)(c), 2511(2)-(a)(i) AND 2511(3)(a).

The Second Circuit failed to discuss the alleged liability of the In-

termediary Banks under 18 U.S.C. §§ 251-1(1)(c), (2)(a)(i) and (3)(a), for the programming "stop ques" in their computer modems, so to acquire the contents of the Limited Partnerships' three in transit electronic fund transfer communications (App. 11b).

Under these sections the Intermediary Banks are prohibited from disclosing the contents of electronic communication, and from using their communication monitoring system to obtain access to electronic communications.

18 U.S.C. § 2511(1)(c), states in pertinent part that, "any person who . . . intentionally discloses . . . to any other person the contents of any . . . electronic communication, knowing or having reason to know that the information was obtained through the [acquiring

of the contents] of a . . . electronic communication in violation of this subchapter . . . shall be punished." (Emphasis added).

18 U.S.C. § 2511(2)(a)(i), states in pertinent part, that the Intermediary Banks "shall not utilize service observing or random monitoring except for mechanical or service quality control checks."

18 U.S.C. § 2511(3)(a), states in pertinent part that the Intermediary Banks "shall not intentionally divulge the contents of any communication . . . while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent or such addressee or intended recipient."

Because the Second Circuit's decision failed to consider these sections it must be reviewed.

IV

BANCO ATLANTICO AND THE BANK OF NEW YORK FAILED TO SATISFY THE "GOOD FAITH" REQUIREMENTS OF 18 U.S.C. § 2707, WHEN THEY DIVULGED THE CONTENTS OF ELECTRONIC COMMUNICATIONS OF THE LIMITED PARTNERSHIPS MAINTAINED IN COMPUTER STORAGE WITHOUT ANY AUTHORIZED WARRANT BEING ISSUED.

The Second Circuit remanded to the District Court the claim of the Limited Partnerships for damages against the Government under 18 U.S.C. § 2701 et seq. (App. 15b). However, based on Judge Weinstein's holding in the Consolidated Bank Case, the Second Circuit held that the Intermediary banks could not be held liable under 18 U.S.C. § 2707(a), because of "their good faith reliance on a court [in rem] warrant or order is a

complete defense under § 2701(d)(1)" (App. 12b).

This holding of the Second Circuit that an in rem warrants is sufficient to satisfy the "good faith" requirements of 18 U.S.C. § 2707, must be reviewed by the Supreme Court since it flagrantly disregards the facts and the requirement under 18 U.S.C. § 2703(a), wherein Congress mandated that prior to permitting the United States access to electronic communication stored for less than 180 days a warrant issued under the Federal Rules of Criminal Procedures was needed.

In summary because electronic communication messages stored by the Intermediary Banks in their capacity as electronic communication services for fewer than 180 days are intended to facilitate in transit communication, thus Congress

provided the same level of privacy as it required for in transit communication, House Report No. 647, 99th Congress, 2nd Session, at page 68 (1986); See §19.5, at p. 375, The Law of Electronic Commerce, Benjamin Wright, Little, Brown and Co.

The undisputed facts are that Limited Partnerships' three electronic fund transfers were disclosed to the Messrs. Hui and Brown based only on verbal telephone order on July 24, and 26, 1990, two weeks before the Seventh In Rem Complaint was executed on August 8, 1990; and, in accordance with 18 U.S.C. § 2703(a), the court warrant required to permit government access to electronic communication in computer storage for less than 180 days is a warrant issued under the Federal Rules of Criminal Pro-

cedures, not a self executing warrant issued under Rule C of the Supplemental Rules For Certain Admiralty And Maritime Claims.

18 U.S.C. § 2707, in pertinent part provides for a cause of action against the Intermediary Banks by "any . . . customer aggrieved by any violation of this chapter," unless a court order, warrant subpoena or certification issued under 18 U.S.C. § 2701 et seq. See 18 U.S.C. § 2703(e).

The 18 U.S.C. § 2707(d), states that exception to this liability on the part of the Intermediary Banks, is if they show their actions was based on "good faith reliance on-

(1) a court warrant or order, a grand jury subpoena, a legislative au-

thorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of. . . ."

Based on the above statutory requirements before "good faith" is found, the decision of the Second Circuit is in error and must be reviewed because the Intermediary Banks do not meet any of the requirements under 18 U.S.C. § 2707(d).

V

A CAUSE OF ACTION FOR BREACH OF CONTACT EXISTS AGAINST THE INTERMEDIARY BANKS BECAUSE THEY DISREGARDED THE LIMITED PARTNERSHIPS INSTRUCTIONS CONTAINED IN THE ACCEPTED ELECTRONIC COMMUNICATIONS.

The Limited Partnerships purchased in the Republic of Venezuela three electronic funds transfers to be sent to their office in the Republic of Colombia. Thus they were both the sender and the intended recipient, who paid for the transmission on the FEDWIRE, CHIPS, or SWIFT communication service.

The Intermediary Banks, as part of the FEDWIRE, CHIPS, or SWIFT communication service, agreed to comply with the instructions contained in the electronic communication paid for by the Limited Partnerships.

Despite these obligations the Intermediary Banks, did:

(i) knowingly not comply with the accepted instructions contained in the Limited Partnerships' electronic fund transfers, based only on the verbal orders of Messrs Hui and Brown; and,

(ii) without the required judicial authority under 18 U.S.C. § 2516(3), the Intermediary Banks knowingly disclosed to and permitted access by the United States to the Limited Partnerships' electronic fund transfers.

From these facts a cause of action exist for direct damages against the Intermediary Banks for breach of contract.

Under common law there is an obligation on the receiving Intermediary Banks to not deviate from the instruction contained in the Limited Partnerships Electronic Communication.

In Evra Corp v. Swiss Bank Corp. 673 F.2d 951 (7th Cir. 1982), although the Court of Appeals held that under the holding of Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. (1854), a suit for consequential damages against a banks who fails to make a requested transfer of funds would not be maintained, the Court in dicta did state that a bank would be liable for "direct" (sometimes called "general") damages Id. p. 955.

Furthermore, in Southern Electric Supply Co. v. Raleigh County National Bank, 320 S.E.2d 515 (W.Va. 1984), the court held that the beneficiary of a wire transfer would have a cause of action against a beneficiary bank for deviation from the instructions without the beneficiaries' consent or proper authority. The Court stated,

> [w]e would be hardpressed to think of a situation in which we could condone a bank's decision to ignore the instructions of a [sender] and unilaterally decide to alter [an electronic fund transfer]. To get a third party's funds, a bank would need explicit authority from the third party.... Whether the unauthorized person is a stranger, family, or bank officer, the withdrawal is wrongful. When a wire transfer comes to a bank, it is obligated by the transmission to credit the designated account. Id. 320 S.E.2d at 519.

This right of action for direct damages relating to the Intermediary Banks deviation from the instructions in the Limited Partnerships' electronic communication without proper authority issued under 18 U.S.C. § 2516(3), is consistent with Regulation J of the Federal Reserve System, 12 C.F.R. §210, (January 1, 1990 Edition), issued by the Board of Governors of the Federal Reserve System pursuant to the Federal Re-

serve Act, 12 U.S.C. § 342(13), 464(19)(f), and 248(i) (j) and (o).

The regulations place a duty on the Intermediary Bank to follow the instructions contained in the wire transfer.

12 C.F.R. §210.26 Definitions, states:

> "Transferee" means a member bank, or other institution that (1) maintains or, if authorized by the Reserve Bank, uses an account at a Reserve Bank and (2) is designated in a transfer item or request to receive the amount of the item or request.

12 C.F.R. §210.30(b) Transferee's agreement, states:

> A transferee...that receives a transfer item, or advice of credit of a transfer item, designating a beneficiary agrees:
> (1) To credit promptly the beneficiary's account or otherwise make the amount available to the beneficiary: or
> (2) To notify promptly its reserve Bank if it is unable to do so because of circumstances beyond its control. (Emphasis added)

The above court decisions and regulations are also consistent with the technological reality dealt with by the Commissioners on Uniform State Laws and the American Law Institute completed in October, 1989, U.C.C. Article 4A, which is aimed at providing a comprehensive body of law governing electronic fund transfer communications. See D. Baker & R. Brandel, The Law of Electronic Fund Transfer Systems, ¶1.01(2d ed. 1988).

On January 12, 1991, the State of New York enacted the State of New York Uniform Commercial Code-U.C.C. §4-A.

Under U.C.C. Section 4A-302, the receiving bank, whether it be the "intermediary bank" or the "beneficiary bank" is obligated to both the sender and the intended beneficiary to follow all instructions of the sender.

Under U.C.C. §4A-405, which underscores the rule that an Article 4A electronic fund transfer is not really a direct transfer of funds from buyer to seller, but instead is a series of transactions. With the completion of each payment order, a bank becomes obligated to pay funds to the next link in the chain, culminating with the duty of the beneficiary's bank to pay the beneficiary. In other words it is a series of contractual obligations to pay rather than a direct exchange of funds from buyer to seller.

Thus when the electronic funds transfers were received by the Intermediary Banks they were obligated under a contract with the electronic funds transfers communication service network to not deviate from the instructions,

and to immediately transmit the electronic funds transfers communication to the Limited Partnerships.

Since no authorized judicial warrant was ever issued under 18 U.S.C. § 2516(3), a cause of action for breach of contract exists, and the Second Circuits holding that the "intervening government actions in ordering the [acquiring of the contents of the three electronic communication] rendered any enforceable contract impossible to perform," must be reviewed (App. 19b).

CONCLUSION

The Petition for Writ of Certiorari should be granted because it involves important national and international questions affecting commercial information technology, as well as the rights and duties for the transmission and com-

puter storage of electronic communication under both recently enacted federal communication law, and under contract theory.

The facts establish that their were intentional:

(1) violations of 18 U.S.C. §§ 251-1(1)(a) and (c); 2511(2)(a)(i); § 2511-(3)(a), based on the procuring of the programming of "stop ques" so to obtain the acquisition of the contents of all in transit electronic funds transfer communications to the Republic of Colombia for over 45 days;

(2) violations of 18 U.S.C. § 2702-(a), by the Intermediary Banks unauthorized divulging of the Limited Partnerships electronic communication in electronic storage; and,

(3) violations of the FEDWIRE, CHIPS, and SWIFT communication system contract with the Limited Partnerships, by the Intermediary Banks.

Thus to leave the Second Circuit decision unreviewed will disregard the recent changes made by Congress in electronic communications law, aimed at positively affect business in the future on the "Electronic Super Highway."

Based on the above the Petition for writ of certiorari should be granted.

Respectfully submitted,

ORGANIZACION JD LTDA., AND
MANUFACTURAS JD LTDA.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ORGANIZACION J.D. LTDA. and MANUFACTURAS J.D. LTDA.,

Plaintiffs,

- against -

UNITED STATES DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, BANCO ATLANTICO, S.A. and THE BANK OF NEW YORK,

Defendants.

Civil Action
No. 92 Civ.3690
(JBW)

JUDGMENT AND ORDER
(Weinstein,J.)
(Chrein,Ch.M.J.)

WHEREAS, the defendants moved pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint; and

WHEREAS, plaintiffs opposed these motions; and

WHEREAS, counsel for the plaintiffs and counsel for the defendants appeared in open court on December 3, 1992; and

WHEREAS, the Court, having heard oral argument from counsel for all

parties on the defendants' motions, and having reviewed all papers relied upon by the defendants in support of their motions.

For the reasons stated orally on the record,

NOW, THEREFORE, IT IS HEREBY ADJUDGED AND ORDERED that the defendants' motions are hereby granted in their entirety; and it is further

ORDERED that the complaint in this action is hereby dismissed as against all defendants with prejudice; and it is further

ORDERED that no sanctions *or costs or disbursements* shall be awarded.

Dated: Brooklyn, New York
December 4, 1992

Hon. Jack B. Weinstein
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1498 -- August Term 1992

(Argued May 3, 1993 Decided *Feb 24, 1994*)

Docket No. 93-6019

----------x

ORGANIZACION JD LTDA., and MANUFACTURAS JD, LTDA.,

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF JUSTICE; DRUG ENFORCEMENT ADMINISTRATION OF THE UNITED STATES OF AMERICA; BANCO ATLANTICO, S.A.; THE BANK OF NEW YORK,

Defendants-Appellees.

----------x

B e f o r e : MESKILL, WALKER,[1]

Circuit Judges, and

---

[1] The Honorable Constance Baker Motley, United States District Judge for the Southern District of New York, sitting by designation.

MOTLEY, District Judge.

Plaintiffs brought a civil damages action alleging statutory and constitutional violations arising out of governmental seizure of numerous electronic fund transfers alleged to involve proceeds from illicit drug trafficking. The United States District Court for the Eastern District of New York (Jack B. Weinstein, Judge) dismissed the complaint in its entirety.

Affirmed in part, vacated in part, and remanded.

ISIDORO RODRIGUEZ, Barranquilla, Columbia S.A., for Plaintiffs-Appellants.

GARY R. BROWN, Assistant United States Attorney, New York, New York (Mary Jo White, United States Attorney for the Eastern District of New York, Robert L. Begleiter, Varuni Nelson, Jennifer C. Boal, Arthur P. Hui, Assistant

United States Attorneys, of counsel), for Defendants-Appellees U.S. Department of Justice and Drug Enforcement Administration of the United States of America.

MARK SULLIVAN, New York, New York (Townley & Updike, of counsel), for Defendant-Appellee Banco Atlantico, S.A.

MICHAEL D. POVMAN, New York, New York, for Defendant-Appellee the Bank of New York.

Per Curiam:

The facts of this case have been set forth thoroughly in a related appeal previously decided by a panel of this court, familiarity with which is assumed. See United States v. Daccarett, 6 F.3d 37 (2nd Cir. 1993), petition for cert. filed, 62 U.S.L.W. 3454 (U.S. Nov. 15, 1993) (No. 93-1020). Daccarett centered around the 1990 government seizure of numerous electronic fund transfers ("EFTs")

alleged to involve the proceeds of illicit drug trafficking, totalling over $12 million. After a two-month trial, a jury found eighteen of twenty-two seized amounts forfeitable. Notably, the jury found that the amounts claimed by the appellants in this case, Manufacturas J.D. Ltda. and Organizacion J.D. Ltda, were not traceable proceeds of illegal money-laundering and narcotics transactions. See United States v. All Funds on Deposit in Any Accounts Maintained at Merrill, Lynch, Pierce, Fenner & Smith, 801 F. Supp. 984, 993 (E.D.N.Y. 1992) (Weinstein, J.) ("All Funds") (affirmed by Daccarett, supra).

The intended recipients of these various money transfers did not sit by quietly when their funds were seized. These parties sued the intermediary

banks for violations of various federal and state statutes. The district court granted summary judgement for the banks, holding that they could not be held liable for following governmental orders respecting claimed governmental funds. See Manufacturas Int'l, Ltda v. Manufacturers Hanover Trust Co., 792 F. Supp. 180 (E.D.N.Y 1992) (Weinstein, J.). In another action, various recipients sued the government attorneys who had ordered the banks to seize the funds; the same district judge dismissed this complaint for failure to state a claim. See Abuchaibe Hnos. v. Maltz, No. 92 Civ. 528 (E.D.N.Y. Mar. 11, 1992) (oral decision).

Plaintiffs in this case are two of the appellants from the Daccarett case, which affirmed the district court's

rulings in the All Funds case. Before trial in the All Funds case, plaintiffs brought a six-count civil complaint against two government agencies and two private banks charging them with statutory and constitutional violations arising from the seizures of the EFTs. Prior to the jury trial in the underlying All Funds case, the district court (Jack B. Weinstein, Judge) granted the defendants' motion to dismiss the plaintiffs' complaint, stating from the bench that its ruling was based on the reasons stated in its two earlier decisions in Manufacturas International, Ltda v. Manufacturers Hanover Trust Co., supra, and United States v. All Funds on Deposit in Any Accounts Maintained at Merrill, Lynch, Pierce, Fenner & Smith, No. CV 90-2510, 1992 U.S. Dist. LEXIS

1881 (E.D.N.Y. Feb. 19, 1992) (a pretrial ruling denying the claimants' motions to vacate the district court's earlier finding of probable cause for the seizures and refusal to suppress certain evidence). Plaintiffs now appeal.

In Daccarett, this court comprehensively explored the legal issues surrounding the All Funds seizures and affirmed the rulings of the district court. Consequently, our discussion of the issues raised by this appeal is brief. For the reasons stated below, we affirm in part the dismissal of the complaint and remand for further proceedings consistent with this opinion.

The Civil Complaint

Counts One and Six of the plaintiffs' civil complaint allege violations of the Fourth and Fifth Amendments of the United States Constitution. This court in Daccarett affirmed the district court's ruling that the seizures did not violate the Fourth Amendment of the Constitution, See Daccarett, 6 F.3d at 49, and that ruling controls here.

Although Daccarett did not discuss the Fifth Amendment, the Supreme Court's latest pronouncement in this area makes it clear that civil forfeitures can violate the Fifth Amendment as well. See United States v. James Daniel Good Real Property, 114 S. Ct. 492, 499-500 (1993). In James Daniel Good, the Court considered whether, in the absence of exigent circumstances, the Fifth

Amendment prohibited the government in a civil forfeiture case from seizing assets without first providing notice and an opportunity to be heard. The Court held that the Fifth Amendment was implicated in civil forfeitures. Id. at 500. Analyzing the civil forfeiture procedure under the three-pronged balancing test of Mathews v. Eldridge, 424 U.S. 319 (1976), the Court ruled that absent exigent circumstances, the government cannot seize an individual's real property via the civil forfeiture mechanism without providing predeprivation notice and an opportunity to be heard. Id. at 501-05.

Because James Daniel Good involved real property, the Court did not address whether personal property is similarly protected by the Fifth Amendment. We

need not decide this issue here, however, because the seizures in this matter plainly involved exigent circumstances, and the James Daniel Good Court made clear that seizures involving exigent circumstances are exempted from predeprivation notice and hearing requirements. Id. at 500. As the Daccarett court reasoned, "[b]ecause the property at issue was fungible and capable of rapid motion due to modern technology, we are satisfied that exigent circumstances were present here." Daccarett, 6 F.3d at 49. Thus, the plaintiffs can claim no Fifth Amendment violation.

Count Two of the complaint alleged two distinct violations of the Electronic Communications Privacy Act of 1986 ("ECPA"), 18 U.S.C. §§ 2510 et

seq., which govern interception of wire electronic communications, and §§ 2701 et seq., which govern access to certain stored electronic records. First, plaintiffs claim that they are entitled to civil damages under § 2520 for the alleged unlawful "interception" of the EFTs. However, the Daccarett court ruled that the seizures did not constitute "interceptions" under the ECPA because no "device" was used, as required under 18 U.S.C. § 2510(4). See Daccarett, 6 F.3d at 54. Because no "interceptions" occurred, plaintiffs have no cause of action under § 2520.

Second, plaintiffs claim they are entitled to civil damages under § 2707(a), which provides a civil cause of action for the unlawful access to stored communications in violation of § 2701.

The statute states:

> (a) Cause of action. -- Except as provided in section 2703(e), any provider of electronic communication service, subscriber, or customer aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or international state of mind may, in a civil action, recover from the person or entity which engaged in that violation such relief as may be appropriate.

18 U.S.C § 2707(a). We agree with the district court that the defendant banks cannot be held civilly liable under § 2707(a) for a violation of § 2701 because their good faith reliance on a court warrant or order is a complete defense under § 2707(a) for a violation of § 2701 because their good faith reliance on a court warrant or order is a complete defense under § 2707(d) (1). See Manufacturas Int'l, Ltda v.

Manufacturers Hanover Trust Co., 792 F. Supp. at 192-93.

However, the government agencies' potential liability under § 2707 is a different matter. Few courts have addressed the complex issues surrounding the government's possible liability under § 2707(a). We note that the district court's two decisions upon which it relied when ruling from the bench to dismiss the plaintiffs' complaint had no occasion to discuss the government's liabiiity under § 2707(a).

As an initial matter, we address whether a governmental entity can be held civilly liable under § 2707(a). To our knowledge, only two district courts have discussed this question, both of which suggested that a governmental "entity" may be liable under § 2707.

See PBA Local No. 38 v. Woodbridge Police Dep't, 832 F. Supp. 808, 823 (D.N.J. 1993); Bodunde v. Parizek, No. 93-C-1464, 1993 U.S. Dist. LEXIS 7365 (N.D. Ill. May 27, 1993). Those courts concluded that prior to the 1986 enactment of the ECPA, the definition of "person" in § 2510(6) already included business entities such as corporations and partnerships, and that in order to give full meaning to the new statutory language, "entity" must be taken to mean governmental entity. They have found support for this conclusion in legislative history that specifically references "governmental entities" as potentially liable under § 2707(a). See S. Rep. No. 541, 99th Cong., 2d Sess.43 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3597 (stating that an aggrieved

party "may recover from any person or entity -- including governmental entities -- who knowingly or intentionally violated this chapter"). We find the analyses of these courts persuasive and hold that governmental "entities" are subject to liability under § 2707(a).

Apart from this determination, two issues remain: whether the particular plaintiffs in this case are able to bring an action under § 2707(a), and whether the government agents impermissibly violated the ECPA. Because the resolution of these issues requires a more complete factual record, we remand the § 2707(a) claim under Count Two against the government defendants for an initial determination by the district court.

We offer several observations for the benefit of the district court on remand. First, § 2707(a) confines those who may recover damages to "any provider of electronic communication service, subscriber, or customer aggrieved." Plaintiffs here were to be ultimate beneficiaries of sequential electronic fund transfers. Whether plaintiffs fit within the class of individuals who may bring suit under § 2707(a) is an open question that might well turn on the issue of whether the term "customer" applies to the plaintiffs in the factual circumstances presented here.

Second, if the district court should find that plaintiffs fit within the class of "any provider of electronic communication service, subscriber, or customer aggrieved" under § 2707, a

matter as to which we express no opinion, then the court must decide whether the governmental agents in this case complied with the ECPA, or were somehow excused from doing so. Section 2703 of the ECPA lays out the requirements for governmental access to an electronic communication, satisfaction of which would avoid liability under § 2707(a). Because we believe the district court is in the best position to consider these questions and make appropriate findings of fact in the first instance on remand, we take no position on the merits of this aspect of plaintiffs' § 2707(a) claim against the government.

Counts Three and Four of the complaint alleged breach of contract claims against the defendant banks.

Plaintiffs claim that by failing to forward the wire transfers, the intermediary banks failed to follow the wire transfer rules and regulations of the Federal Reserve System and the Clearing House Interbank Payment System, and that this "breach of contract" caused them damage. In essence, the plaintiffs claim third-party beneficiary status to the contract between the intermediary banks and the wire transfer systems.

Irrespective of whether the plaintiffs can even make out a claim as a third-party beneficiary under New York law, the private intermediary banks cannot be subject to a damage action because the intervening government actions in ordering the seizures of the EFTs rendered any enforceable contract

impossible to perform. See, e.g., RSB Mfg. Corp. v. Bank of Baroda, 15 B.R. 650 (S.D.N.Y. 1981) ("The defense of impossibility extends to judicial action as long as the party seeking to be excused has not caused or failed to prevent the judicial action."); Hamilton Rubber Mfg. Co. v. Greater N.Y. Carpet House, Inc., 47 N.Y.S.2d 210, 211 (N.Y. Sup. Ct. 1944), aff'd, 269 A.D. 681, 53 N.Y.S.2d 954 (1st Dep't 1945); Restatement (Second) of Contracts § 264 (1981). Accordingly, Counts Three and Four were properly dismissed.

Finally, Count Five of the complaint alleged violations of the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. §§ 3401 et seq. However, as this court explained in Daccarett, the RFPA was "meant to protect those who

maintain accounts in their names at financial institutions," and because the plaintiffs "never maintained accounts in their names at the intermediary banks," there was no violation of the RFPA. 6 F.3d at 51-52 (emphasis in original). Thus, the RFPA provides no basis for relief and Count Five, too, was properly dismissed.

Conclusion

For the foregoing reasons, we affirm the dismissal of the civil complaint on Counts One, Three, Four, Five, and Six, and Count Two in part. We vacate and remand that part of Count Two which alleged a claim for civil damages against the government under § 2707(a) for further proceedings consistent with this opinion.

Parties to bear their own costs.

Reported at: 792 F. Supp. 180
(E.D.N.Y., 1992)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MANUFACTURAS INTERNACIONAL LTDA,

Plaintiff,

- against -

MANUFACTURERS HANOVER TRUST CO.,

Defendant.

MEMORANDUM AND ORDER
cv-91-4536
(JBW)

ABUCHAIBE HNOS. LTDA,

Plaintiff,

- against -

BANCO ATLANTICO S.A.,

Defendant.

COMERCIAL SAMORA,

Plaintiff,

- against -

BANCO ATLANTICO S.A.,

Defendant.

CREACIONES VIVIANA,

Plaintiff,

- against -

BANCO ATLANTICO S.A.,

Defendant.

CONSOLIDATED BANK CASES

NELSON GOMEZ-COSTAFAST, and
NELSON GOMEZ- FASTER,
Plaintiffs,

- against -

BANK OF NEW YORK,
Defendant.

CREACIONES VIVIANA, LTDA,
Plaintiff,

- against -

BANCO ATLANTICO S.A.,
Defendant.

COMERCIAL ESTRELLA LTDA,
Plaintiff,

- against -

BANK OF NEW YORK,
Defendant.

CONFECCIONES Y TEJIDOS
NACIONALES LTDA,
Plaintiff,

- against -

MANUFACTURERS HANOVER TRUST CO.,
Defendant.

MANUFACTURERA DEL ATLANTICO LTDA,

Plaintiff,

- against -

MANUFACTURERS HANOVER TRUST CO.,

Defendant.

INDUSTRIAS MARATHON LTDA,

Plaintiff,

- against -

MANUFACTURERS HANOVER TRUST CO.,

Defendant.

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WEINSTEIN, J.:

In ancient times, the dagger used to stab a person to death was forfeited to the Crown -- a practice having both legal and religious significance. 2 Sir Frederick Pollock & Frederic W. Maitland, The History of English Law 473-74 (2d Ed. 1968); Exodus 21 21:29. Recently this concept of the deodand has been extended to permit the government to seize the profits of narcotics traffickers. See 21 U.S.C. § 881 et seq. (1988 & Supp. III 1991), and 18 U.S.C. § 981 et seq. (1988 & Supp. III 1991). Expanding an archaic concept from a simpler society to fit our complex technology creates the interesting legal tensions reflected in these proceedings. Yet, the essential ancient and modern theory that

forfeiture occurs simultaneously with the tainting of the object by the crime applies and requires dismissal of these Bank Cases. See 18 U.S.C. § 981(b); 21 U.S.C. § 881(h).

Modern forfeiture cases continue to reflect the legal fiction that is the property which has committed a wrong. United States v. One Mercedes-Benz 380 SEL VIN # WDBCA 33A1BB10331, 604 F. Supp. 1307, 1312 (S.D.N.Y. 1984) ("the vehicle itself is guilty of facilitating crime"), aff'd, 762 F.2d 991 (2d Cir. 1985). As in the distant past, the accused instrument is instantaneously the property of the government when it becomes tainted with the heinous crime -- here, drug trafficking. 21 U.S.C. § 811(h) (1988 & Supp. III 1991) ("All right, title, and interest in property

[seized . . . shall vest in the United States upon commission of the act giving rise to forfeiture under this section."); see cases cited infra Part III. The government, as putative owner of allegedly guilty funds, is entitled to take appropriate steps to locate the property and take it into custody. Cf. 21 U.S.C. § 881(c) (1988 & Supp. III 1991) ("Property taken or detained . . . shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof.").

As part of a suspected drug money-laundering operation, large amounts of funds were being electronically transferred from Europe to South America via New York banks. The banks

cooperated with government requests, subpoenas, and court orders by stopping transmission and turning the funds over to the court. The claimants to the funds -- primarily Colombian business concerns -- sue the banks in these Bank Cases for loss of the use of their funds and other claimed violations.

The banks move to dismiss. Their argument is elementary and correct: those who assist the government are not liable to those who claim ownership of what the government contends is already forfeited by the taint of drug trafficking. Faced with competing claims to the same funds, the banks followed instructions and took the sensible step of paying the moneys into court in a form of interpleader. Even if after adjudication it is determined

that the funds are not tainted, no fault can be attributed to the banks.

I. FACTS

The electronic funds transfers at issue were seized based on complaints in United States v. All Funds on Deposit at Merrill Lynch, Pierce Fenner & Smith, Inc., CV 90-2510 (All Funds). These funds are alleged by the government to be the proceeds of illegal narcotics transactions forfeited under 21 U.S.C. § 881 et seq. (1988 & Supp. III 1991), and 18 U.S.C. § 981 et seq. (1988 & Supp. III 1991). The instant parallel private actions against Manufacturers Hanover Trust, Banco Atlantico, and the Bank of New York are consolidated as the Bank Cases.

The first government document to

mention these plaintiffs was the Third Amended All Funds Complaint filed July 18, 1990, with its accompanying Supplemental Warrant for Arrest of Articles in Rem issued pursuant to Rule C(3) of the Supplementary Rules for Certain Admiralty and Maritime Claims. An individual named Jose Santacruz-Londono and others working with him had allegedly "conducted extensive narcotics trafficking and money laundering enterprises, involving millions of dollars and multi-kilograms of cocaine smuggled into the United States and distributed, in part, in the New York metropolitan area."

Santacruz-Londono is said to hold a high position in the Cali drug cartel of Colombia. In 1985, he was indicted in the Eastern District of New York for

conspiring to distribute cocaine, distributing cocaine, and operating a continuing criminal enterprise. He is a fugitive.

The complaint alleged that in connection with Santacruz-Londono's narcotics trade, substantial sums of money have been deposited in, withdrawn from, and transferred to and from accounts located in the United States, including the defendant accounts, and other accounts located in Europe, Panama, and Colombia.

During the month of June 1990, three individuals believed to be connected with the Santacruz-Londono organization had been observed meeting and depositing large sums in accounts at the following places and times:

June 11	Bologna, Italy
June 12 - 18	Portofino, Italy;

	Luxembourg City; Brussels; Copenhagen
June 19	Stockholm
June 20	East Berlin and West Berlin
June 21	Amsterdam

On June 29, 1990, two of the alleged Londono compatriots were arrested on money-laundering charges. A flurry of wire transfer activity followed these arrests.

On July 12, 1990, the Eastern District of New York issued an International Letter Rogatory to the Federal Republic of Germany on information that Santacruz-Londono and others had imported and distributed cocaine in the United States and conspired to disguise the sources and ownership of the proceeds. The government claimed that the Santacruz-Londono organization was importing approximately 3,000 kilograms of cocaine

a month into the United States.

A district judge of this court signed the Letter Rogatory and subsequent arrest warrants. The banks which are defendants in these Bank Cases were instructed in the Supplemental Warrants for Arrest of Articles in Rem accompanying the Third through Seventh Amended Complaints filed July 18 through August 3, 1990 to attach all funds on deposit in the name of various named individuals and entities and "all related entities and individuals." The United States Attorney also requested by telephone that the banks inform him of all electronic funds transfers received for third-party beneficiaries, only some of whom were named.

From the third week of July through the month of August 1990, the banks

faxed copies of each transactions to the United States Attorney, who then instructed the banks whether the beneficiaries were "related entities or individuals" and whether the transfers should be attached. The same or the next day the bank would get official notification to seize. Each of the successive Amended Complaints in All Funds named more beneficiaries as their identities became know.

There are now twenty-three claimants in All Funds, ten of whom are plaintiffs in these Bank Cases. None of the plaintiffs in the Bank Cases maintained accounts at the defendant banks. Rather, the plaintiffs were customers of Colombian banks that maintained correspondent banking relationships with the defendant banks.

The defendant banks were intermediary banks between the European originating banks and the Colombian receiving banks.

To effect the wire transfers, the defendant banks were supposed to credit the Colombian banks' correspondent accounts. In turn, the Colombian banks were to advise the beneficiaries of the credits. Instead, the defendant banks complied with the requests of the United States Attorney and the instructions of the court and seized the funds on deposit and the wire transfers.

On July 24, 1990, a show cause order presented by the government why the funds should not be paid into court was not opposed by the claimants. The court on July 30, 1990 ordered the banks to pay all attached funds into court. The order also instructed that funds

submitted to the court should be accompanied by identifying information such as the beneficiary and the ordering party. During August 1990, the banks complied, and seized funds were transmitted to the Clerk of the Court of this district. The funds are being maintained in an interest-bearing account pending the outcome of the All Funds trial set to begin on March 9, 1992.

On March 26, 1991, the All Funds claimants moved for summary judgment and to dismiss the government's complaint on the ground that the government lacked probable cause to seize the funds, that wire transfers are not a res, and that the funds were seized without a warrant. On April 12, 1991, this court denied the motions to dismiss and for summary

judgment. The case was remanded to a Magistrate Judge for a decision on whether there was probable cause to seize the funds as proceeds of narcotics trafficking and money-laundering. A supplemental hearing before the court was to be scheduled in the event that the Magistrate Judge found probable cause.

After a hearing, the Magistrate Judge found that the government had probable cause to seize the funds. On May 28 and 29 and June 6, 1991, a district judge also held a hearing on the probable cause issue. On June 13, 1991 this court issued an order finding that, based on the documentary evidence and the testimony of witnesses and experts, probable cause existed to believe that all the funds seized by the

government and the subject of the verified claims are subject to forfeiture, except one Merrill Lynch account in the name of Jaime and Cecilia Vargas in the amount of $8,542.35. That small amount was released. The subject funds of the June 13 order were those on deposit in certain identified accounts and the wire transfers at issue in these Bank Cases.

The Bank Cases were then pending in the district court for the Southern District of New York. On October 30, 1991, that court transferred the consolidated Bank Cases to the Eastern District of New York on the grounds that the cases were legally and factually related to United States v. All Funds. See 28 U.S.C. § 1404(a) (1988). In the Bank Cases, plaintiffs argue that the

banks violated several federal statutes by seizing the funds: the Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq., the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510 et seq. (as amended by the Electronic Communications Privacy Act of 1986), the Federal Reserve Act, 12 U.S.C. § 464 et seq., and the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 et seq. In addition, plaintiffs have several state law claims based on the right to privacy, article 4-A of the Uniform Commercial Code, conversion, breach of a third-party contract, and gross and ordinary negligence. None of these federal or state claims has merit.

II. FORFEITURE PROCEEDINGS

Under the forfeiture statutes, 21 U.S.C. § 881 et seq. (1988 & Supp. III 1991), and 18 U.S.C. § 981 et seq. (1988 & Supp. III 1991), the government may seize any funds and objects of value furnished or intended to be furnished in exchange for a controlled substance. In addition, the government may seek forfeiture of all objects or funds traceable to or intended to facilitate such exchanges. Congress intended that forfeiture be "a powerful weapon in the war on drugs." United States v. 141st Street Corp., 911 F.2d 870, 878 (2d Cir. 1990), cert. denied, 111 S. Ct. 1017 (1991).

No procedural rules specifically apply to forfeiture actions. Instead, the government applies rules borrowed

from the customs laws and from admiralty and maritime law. One court has suggested that the application of these rules to forfeiture actions has created "a procedural morass--a morass in which the parties . . . bec[o]me hopelessly entangled." United States v. $38,000 in United States Currency, 816 F.2d 1538, 1540 (11th Cir. 1987). See generally George C. Pratt & William B. Petersen, Civil Forfeiture in the Second Circuit, 65 St. John's L. Rev. 653 (1991). This is somewhat of an exaggeration. Judicious use of available procedures and substantive law has permitted the courts to protect the rights of all concerned.

The present case combines the civil forfeiture laws with another area of law which has evolved with little

regulation: the law of electronic funds transfers. Although electronic funds transfers account for the movement of hundreds of trillions of dollars, few regulations govern the field. See generally Rainer Stockmann, Liability of Intermediary and Beneficiary banks in Funds Transfer: A Comparative Study of American and German Law, 8 Int'l Tax & Bus. Law. 215, 217 (1991); Jeffrey S. Tallackson & Norma Vallejo, International Commercial Wire Transfers: The Lack of Standards, 11 N.C.J. Int'l L. & Com. Reg. 639, 639 n.1 (1986). As two commentators have noted:

> Despite [the] ubiquity [of such transactions] in domestic and in domestic and international banking as well as the susceptibility of such systems to error and fraud, wire transfer systems have evolved virtually immune from any legislative regulation of the parties' right and duties. No coherent body of law governs this

area.

Id. at 639-40.

To understand the facts of this case, some background in the mechanics of wire transfers is necessary. The following brief description of one kind of funds transfer system is borrowed from Delbrueck & Co. v. Manufacturers Hanover Trust Co., 609 F.2d 1047, 1049 n.1 (2d Cir. 1979) (description reprinted from district court opinion, 464 F. Supp. 989, 992 n.5 (S.D.N.Y. 1979)).

III. MECHANICS OF ELECTRONIC FUNDS TRANSFER

An electronic funds transfer begins with the sending bank. It normally receives a telex from the bank, individual, or corporate entity that is originating the transaction, instructing

the sending bank to send funds. The sending bank tests and verifies the telex before transmitting the request, with all the identifying information, from its local computer operator to a central computer network. The central computer for the transfer system stores the information and causes a sending message to be automatically printed at the sending bank.

The sending bank, having determined that payment is appropriate, returns the sending message to its local computer operator to reinsert the message into the computer and press a release key. When the central computer receives this message, it causes the simultaneous printing of a debit ticket at the sending bank and a credit ticket at the receiving bank. The central computer

creates a permanent record of the transaction and adjusts the accounts of the sending and receiving banks. These steps are almost instantaneous.

Once the receiving bank has received the credit ticket, the individual or corporate beneficiary of the transfer is notified and the funds are made available to the recipient -- generally the same day. The funds transfer is considered completed at the moment the receiving bank receives the credit message, not when the beneficiary acquires the funds. See generally Richard M. Gottlieb, Payment, Settlement, and Finality, in UCC Article 4-A. A Practical Guide for Bankers and Bank Counsel (Am. Bankers Ass'n 1991) [hereinafter Bankers Guide].

The receiving bank may be acting as

an intermediary bank for a third bank, such as an overseas correspondent bank. If so, another transaction is necessary between the intermediary bank and the correspondent bank. Once the intermediary bank receives the funds, it should credit the account of the correspondent bank. In the instant case the sending banks are in Europe, the intermediary banks are in New York, and the correspondent banks are in Colombia. The funds transfers were seized at the intermediary banks before the funds were credited to the Colombian correspondent banks.

As already indicated, acting on its own investigation, the United States Attorney notified the defendant intermediary banks by telephone that certain electronic funds transfers would

be credited to those banks from sending banks. The intermediary banks examined all incoming wire transfers for their correspondent banks in Colombia, notifying the United States Attorney of all transfers designated for the identified beneficiaries. In addition, the banks notified the United States Attorney of other wire transfers to third-party beneficiaries, awaiting notification whether those funds were intended for "related individuals and entities" and should also be seized. Upon instruction from the United States Attorney, the intermediary banks seized the funds and turned them over to the Clerk of the Court for this district.

In the context of a forfeiture proceeding, the plaintiffs have no cause of action against the banks. The

property is considered forfeited at the moment the illegal act is committed. 18 U.S.C. § 981(b) (1988 & Supp. III 1991); 21 U.S.C. § 881(h) (1988 & Supp. III 1991). "[T]itle vests absolutely in the sovereign at the date of the illegal act." United States v. 1314 Whiterock & Improvements, San Antonio, Bexar County, Texas, 571 F. Supp. 723, 725 (W.D. Tex. 1983); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, ___, 109 S. Ct. 2646, 2653 (1989) (vesting at time of illegal act under "taint theory)); United States v. Trotter, 912 F.2d 964, 966 & n.2 (8th Cir. 1990) (since government's title in forfeited property relates back to commission of crime, district court could not require fine assessed against defendant to be paid from seized funds); United States v.

Walker, 900 F.2d 1201, 1204-05 (8th Cir. 1990) (forfeiture occurs at time of illegal act even though property may not be seized until later); In re Metmor Fin., Inc., 819 F.2d 446, 449-50 (4th Cir. 1987) (since at moment of criminal act original owner no longer owns the property, it is only innocent lienholder who may accrue interest); United States v. P.O. Box 1303, R.R. No. 2, Pekin Ill., 734 F. Supp. 841, 842 (C.D. Ill. 1990) (upon commission of crime United States succeeded to interest which non-innocent owners held as contract buyers, where innocent owners held fee simple subject to a contract for purchase); United States v. 2511 E. Fairmont Ave., Baltimore, Md., 722 F. Supp. 1273, 1279 (D. Md. 1989) (since under "relation-back doctrine" of section 881(h) title

had vested in the government at time of illegal act, parents could not succeed as heirs or donees of property from their son); United States v. One Piece of Real Property Located on Trafalgar Street in City of Aiken, S.C., 700 F. Supp. 857, 860-61 (D.S.C. 1988) (date on government's title relates back to date of crime), aff'd, 895 F.2d 987 (4th Cir. 1990); United States v. Real Property Titled in the Name of Shashin, Ltd, 680 F. Supp 332, 335-37 (D. Haw. 1987) (describing various court's treatment of post-seizure interest); United States v. Rod & Reel Fish Camp, 660 F. Supp. 483, 487 (S.D. Miss.) (since forfeiture occurs as of time of criminal act, third parties cannot acquire legal interest in property after that date), dismissed, 822 F.2d 57 (5th Cir.), remanded, 831

F.2d 566 (5th Cir. 1987); United States v. One Condominium Apartment, 636 F. Supp. 457, 458 (S.D. Fla. 1986) (since title vests in the United States at time of crime, innocent claimants only entitled to their principal and accrued interest up to time of seizure).

More precisely, the forfeiture, which relates back to the time of commission of the illegal act, is then " 'consummated' by a judgment or decree of a court." Western Pac. Fisheries v. SS President Grant, 730 F.2d 1280, 1287 (9th Cir. 1984) (dicta); see United States v. 1314 Whiterock & Improvements, San Antonio, Bexar County, Texas, 571 F. Supp. 723, 725 (W.D. Tex 1983) ("Seizure and subsequent judicial decree of forfeiture merely confirm the forfeiture that has already taken place."); United

States v. South 23.19 Acres of Land, 694 F. Supp. 1252, 1254 (E.D. La. 1988) (purpose of forfeiture proceeding is "only to perfect th[e] title" as between the government, which succeeded to a one-half interest when husband committed crime, and the wife, who was innocent and owned other half in community property state). But see United States v. Property Titled in the Name of Alexander Morio Toki & Elizabeth Mila Toki, ___ F. Supp.___, 1991 WL 255359 (Oct. 11, 1991) (where property held in tenancy by the entirety, at moment of crime innocent wife should succeed to entire property and thus the government succeeds to nothing but is in a position analogous to that of an unsecured judgment creditor of the non-innocent owner spouse). The bank is in this

case, acting at the direction of the government, seized money which the government considered its own because of the taint of narcotics trafficking.

IV. FEDERAL STATUTORY CLAIMS

A. RIGHT TO FINANCIAL PRIVACY ACT

The Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq. (1988) [RFPA], is designed to protect the confidentiality of financial records from government intrusion. Section 3403(a) provides:

> No financial institution, or officer, employees, or agent of a financial institution, may provide to any Government authority access to or copies of, or the information contained in, the financial records of any customer except in accordance with the provisions of this chapter.

12 U.S.C. § 3403(a) (1988 & Supp. III

1991). Only where the customer has given authorization or where the financial institution takes action pursuant to an administrative or judicial subpoena, a search warrant, or certain other enumerated categories of formal requests may the government authorities obtain access to or acquire copies of the records. Id. §§ 3402, 3413, 3414.

The RFPA functions as an "express limitation on the authority of government agencies to acquire records of an individual's financial transactions." Clayton Brokerage Co. v. Clement, 87 F.R.D. 569, 570 (D. Md. 1980). The Act was designed to balance two competing interests: "[the] customers' right of privacy and the need of law enforcement agencies to obtain

financial records pursuant to legitimate investigations." Id. at 570-71 (citing 1978 U.S. Code Cong. & Adm. News 9273, 9305).

The Right to Financial Privacy Act does not apply here because the complainants are not "customers" within the meaning of the statute. Section 3401 defines a customer as

> any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name . . . .

12 U.S.C. § 3401(5) (1988 & Supp. III 1991). The plaintiffs, as beneficiaries of wire transfers, were arguably "utilizing a [] service of a financial institution." They did not, however, maintain accounts in their own names at

the defendant banks.

Plaintiffs' position is that the RFPA requires that a person have an "account maintained in [his] own name" only when the bank is acting as his fiduciary, but not when the person is utilizing a service of the financial institution. This argument is not persuasive. The commas surrounding the phrase beginning with "or" and ending with "fiduciary" reasonably suggest that a customer must have an account in his own name in both situations. See Ridgeley v. Merchants State Bank, 699 F. Supp. 100, 102 (N.D. Tex. 1988) ("the Act protects individuals in whose name the financial account is held") (emphasis omitted); Duncan v. Belcher, 813 F.2d 1335, 1338-39 (4th Cir. 1987) (same).

The RFPA "carefully limits the kinds of customers to whom it applies, and the types of records they may seek to protect." Securities & Exch. Comm'n v. Jerry T. Obrien, Inc., 467 U.S. 735, 745 (1984) (citations omitted); see Spa Flying Serv., Inc. v. United States, 724 F.2d 95, 96 (8th Cir. 1984) (corporation is not a customer since it is not enumerated in definition of "person" in the Act); Pittsburgh Nat'l Bank v. United States, 771 F.2d 73, 76 (3rd Cir. 1985) (same). Since the beneficiaries did not maintain accounts in their own names, they are not customers within the meaning of the statute even though they arguably "utilized a[] service" of the bank.

Because the Act does not apply, we need not decide whether seizure of funds

constitutes the transfer to the government of "information" or "financial records." Cf. United States v. Eighty-Eight (88) Designated Accounts Containing Monies Traceable to Exchs. for Controlled Substances, 740 F. Supp. 842, 851 & n.15 (S.D. Fla. 1990) (court in seizure case concerned about government's "apparent violation of the RFPA"). Nor is it necessary to decide whether the litigation exception could apply in an in rem proceeding nominally one by the government against the funds -- that is, whether the beneficiaries of wire transfers can be considered "parties." See 12 U.S.C. § 3413(e) (1988 & Supp. III 1991).

B. OMNIBUS CRIME CONTROL AND SAFE STREETS ACT

Plaintiffs also claim that the

banks, in seizing the wire transfers of funds, violated the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510 et seq. (1988 & Supp. III 1991). That statute was amended in 1986 by the Electronic Communications Privacy Act [ECPA], which was passed on October 21, 1986 and became effective 90 days later. Congress broadened the prior reach of the statute to cover many new developments in technology. The legislative history points out that the amendment is designed to

> Update and clarify Federal privacy protections and standards inlight of dramatic changes in new computer and telecommunications technologies.

1986 U.S. Code Cong. & Admin. News 3555, 3555. Before amendment the Act prohibited only the "aural" interception of wire and oral communications and

protected only those wire communications sent by common carriers. The impetus for amendment was the need to protect privacy while keeping pace with modern technology, but the amendment may have reduced privacy protection. See generally Russell S. Burnside, The Electronic Communications Privacy Act of 1986: The Challenge of Applying Ambiguous Statutory Language to Intricate Telecommunication Technologies, 13 Rutgers Computer & Tech. L.J. 451, 494-95 (1987) (1986 Act cured "ambiguities and antiquities of the 1968 Act . . . [but] at the expense of privacy protections"); Fred Jay Meyer, Don't Touch That Dial: Radio Listening Under the Electronic Communications Privacy Act of 1986, 63 N.Y.U. L. Rev. 416, 434 (1988) (arguing

that although the 1986 bill was intended to curb increasing surveillance, it "came to embody the Justice Department's wish list" with concomitant reduced privacy protections); L. Tribe, The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontiers, Keynote Address at the First Conference on Computers, Freedom and Privacy (proposing Constitutional amendment to address conjunction of privacy and technology), cited in Robert Garcia, "Garbage In, Gospel Out": Criminal Discovery, Computer Reliability, and the Constitution, 38 UCLA L. Rev. 1043 (1991).

The statute as amended now prohibits the interception of "electronic communications" as well as oral and wire communications. It

applies to a wide range of new technologies, including electronic mail and bulletin boards, computer-to-computer communications, remote computer services, cellular telephones, portions of cordless telephone communications, pen registers, trap and trace devices, and certain kinds of pagers and satellite transmission. 1986 U.S. Code Cong. & Admin. News 3555, 3562-65. As pointed out in the legislative history:

> Today we have large-scale electronic mail operations, computer-to-computer data transmission, cellular and cordless telephones, paging devices, and video teleconferencing. A phone call can be carried by wire, by microwave or fiber optics. It can be transmitted in the form of digitized voice, data or video.

Id. at 3556 (citation omitted). An electronic communication is defined as

> any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature

> transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system . . . .

18 U.S.C. § 2510(12) (1988 & Supp. III 1991). It includes digital and scrambled symbols. Id. § 2510(16)(A). Bank-to-bank funds transfers and transmission of financial records were intended to be protected electronic communications under the amended statute. See 1986 U.S. Code Cong. & Admin. News 3555, 3562.

Further technological advancements will raise new problems. For example, whereas in earlier days eavesdroppers needed to tap the lines of a computer directly, now they can intercept the electromagnetic radiation emitted by computers and their peripherals, either actively from cables or passively as the radiation moves through the ether. See

Christopher J. Seline, Eavesdropping on the Compromising Emanations of Electronic Equipment: The Laws of England and the United States, 23 Case W. Res. J. Int'l L. 359, 360 & nn.8-9 (1991); see also Russell S. Burnside, The Electronic Communications Privacy Act of 1986: The Challenge of Applying Ambiguous Statutory Language to Intricate Telecommunication Technologies, 13 Rutgers Computer & Tech. L.J. 451, 497-98 (1987) (certain distinctions the 1986 statute makes among various electronic devices are already obsolescent). It has been suggested that in the twenty-first century specialized hardware and software, connected by wires, radio waves, and infrared, will be so ubiquitous that no one will remark their

presence. Mark Weiser, The Computer for the 21st Century, in Scientific American, at 93 (Sept. 1991). Such devices will keep track of individuals and objects, their location and function, without any awareness on the part of subjects that they are being monitored. Id.

That the statute was amended to keep pace with technological advancements does not change its purpose and scope. Usually known as the federal wiretap act, the statute was designed by Congress to create a uniform system to govern electronic surveillance. See 1968 U.S. Code Cong. & Admin. News 2112, 2153, Cited in United States v. Clemente, 482 F.Supp. 102, 106 (S.D.N.Y. 1979), aff'd, 633 F.2d 207 (2d Cir. 1980). The Act "represent[ed] an

attempt by Congress to establish a system of electronic surveillance subject to rigorous safeguards." Clemente, 482 F.Supp. at 106; see also United States v. Tortorello, 480 F.2d 764, 773 (2d Cir.) ("The Act represents an attempt by Congress to establish a limited system of electronic surveillance . . . ."), cert. denied, 414 U.S. 866 (1973).

The Eleventh Circuit in United States v. Herring, 933 F.2d 932 (11th Cir. 1991), in a case interpreting another section of the statute which describes prohibited devices, addressed the question whether the 1986 amendments "changed the nature of the statute." Id. at 934. At issue were the convictions of defendants in the district court for selling devices that

unscramble satellite pay-television transmissions. Noting that the 1986 amendments simply substituted "intentionally" for "wilfully" and added "or electronic" to the list of kinds of communications, the court concluded that the amendments effected no other change in the statute's scope. Id. at 934-35; see also Christopher J. Seline, Eavesdropping on the Compromising Emanations of Electronic Equipment: The Laws of England and the United States, 23 Case W. Res. J. Int'l L. 359, 375 (1991) ("[the 1986] Act did not modify the main concerns of Title III"). The statute continues to be directed at regulating surveillance through prohibiting the interception of the contents of communications by any electronic, mechanical, or other device.

18 U.S.C. § 2510(4) (1988 & Supp. III 1991).

The seizure of electronic funds transfers by banks following government and court instructions in forfeiture proceedings is not within the ambit of the wiretap statute. Forfeiture proceedings are not surveillance. In these Bank Cases, since the funds and the transfers were being claimed in good faith as belonging to the government, obtaining information on their destination and taking them into government possession was not a violation of the statute.

There is little doubt that the war on drugs, including the skirmishes around forfeitures, has reduced the law's privacy protections. See generally United States v. Glover, ___

F.2d ___, ___, 1992 WL 29046, at *16 (2d Cir. 1992) (Oakes, C.J., dissenting) ("One would hope that the war on drugs does not make for a police state . . . ."); United States v. Monsanto, 924 F.2d 1186, 1204 (2d Cir.) (Oakes, C.J. dissenting) (disagreeing with majority's decision in light of "the squeeze already exerted on prosecutorial and judicial resources by the flood of narcotics cases inundating the federal courts"), cert. denied, 112 S. Ct. 382 (1991); United States v. Riley, 906 F.2d 841, 850 (2d Cir. 1990) (Weinstein, J., dissenting) ("Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great.") (citing Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989)

(Marshall, J., dissenting)). Nevertheless, there is no warrant in the wiretapping or electronic eavesdropping provisions to protect those Omnibus Crime Control and Safe Streets Act as amended and the forfeiture statutes, Congress will have to act to provide further protection to claimants.

The wiretap act has no application because funds in forfeiture proceedings are deemed to belong to the government at the time of their criminal use. The statute cannot apply where, as here, the government reasonably viewed the funds as its own. The concept that ownership of the object is transferred instantaneously at the time of criminality provides a conceptual distinction making the laws governing wiretapping and interference with

communications irrelevant.

Even if the statute applied, the banks would not be subject to liability. As noted above, the 1986 amendments substituted "intentionally" for "willfully." Since the instant funds were already forfeited to the government as a result of their illegal genesis, the government's intent was to seize its own funds. The banks had no independent intention other than to follow the directions of the United States Attorney. The banks should face no liability where they intentionally acted within their perceived legal obligations by following the instructions of the United States Attorney and the court.

Moreover, under the statute there is no liability where a party to the transfer intercepts the communication by

consent or under color of law:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

18 U.S.C. § 2511(2)(c) (1988 & Supp. III 1991). No cause of action may be maintained against private actors where they are ordered by government authorities to intercept communications. See Camacho v. Autoridad de Telefonos, 868 F.2d 482, 489-90 (1st Cir. 1989) (telephone companies entitled to immunity under that section when acting at the direction of federal officers). Nor is there liability for the interception of electronic communications in transit or in electronic storage where one party to the communication consented to access.

See American Computer Trust Leasing v. Jack Farell Implement Co., 763 F. Supp. 1473, 1494-95 (D. Mn. 1991). The banks, and not the beneficiaries, were parties to the communication and consented to the interception. They acted at the direction of the United States Attorney as to funds the government claimed as its own.

Another provision of the statute specifically exempts from liability the providers of an electronic communication service who act at the direction of a court order:

> Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications . . . if [the above enumerated persons have] been

> provided with--
>
> (A) a court order directing such assistance signed by the authorizing judge . . . .

18 U.S.C. § 2511(2) (a) (ii) (1988 & Supp. III 1991). The banks, as providers of an electronic communication service, are authorized under the statute to assist the law enforcement agents in the interception of communications.

Good faith reliance on a court warrant or order is also a complete defense under the statute. 18 U.S.C. § 2520(d) (1988 & Supp. III 1991); see also id. § 2707(d)(1) (same defense for interception of stored electronic communications). These Bank Cases are analogous to Jacobson v. Rose, 592 F.2d 515 (9th Cir. 1978), cert. denied, 442 U.S. 930 (1979), where a telephone company received a court order

requesting it to assist county officials with a wiretap. The telephone company asked the officials to redraft the order to ensure that no law was being violated. Similarly, in these Bank Cases, the banks received the complaints and warrants and they requested assistance from the United States Attorney to clarify the instructions. One bank employee declared: "we talked to [the United States Attorney] in order to have a clarification of the test of the subpoena."

The banks, like the telephone company in Rose, are protected because of their reasonable belief that they were acting in compliance with a lawfully issued court order. 592 F.2d at 523-24; see also Smith v. Nixon, 606 F.2d 1183, 1191 (D.C. Cir. 1979)

(telephone company's reasonable expectation of legality when acting pursuant to Executive direction prevented any liability for alleged Constitutional or statutory violation), cert. denied, 453 U.S. 912 (1981); Citron v. Citron, 539 F.Supp. 621 (S.D.N.Y. 1982), aff'd, 722 F.2d 14 (2d Cir. 1983) (same under wiretap statute before amendment), cert. denied, 466 U.S. 973 (1984); Wright v. State of Florida, 495 F.2d 1086, 1090 (5th Cir. 1974); (dicta) (good faith reliance on a court order is a defense under the Fourth Amendment and under the wiretap statute); cf. Kratz v. Kratz, 477 F. Supp. 463, 479-80 (E.D. Pa. 1979) (dicta) (reasonable reliance on an opinion of a United States Court of Appeals may be proper basis for good

faith defense).

It is unnecessary to address the defendants' remaining argument, that they could not have "intercepted" the electronic communications since they were in fact the intended recipients.

C. FEDERAL RESERVE ACT

Plaintiffs assert in a conclusory fashion that the seizure of funds violated Regulation J of the Federal Reserve Act, which "governs the collection of checks and other cash and noncash items by Federal Reserve Banks." 12 C.F.R. § 210 et seq. (1985). Regulation J was promulgated to "define more precisely the terms and conditions under which the Reserve banks receive and handle for collection [such] items." Colonial Cadillac, Inc. v. Shawmut Merchants Bank, N.A., 488 F. Supp. 283,

284 (D. Mass. 1980) (citing 32 C.F.R. § 6210). The provisions of Regulation J serve to "limit liability of a Federal Reserve bank." Appliance Buyers Credit Corp. v. Prospect Nat'l Bank, 505 F. Supp. 163, 164 (C.D. Ill. 1981) (depositor of a sending bank is not a "sender" as defined in 12 C.F.R. § 210.2(e)), aff'd, 708 F.2d 290 (7th Cir. 1983); see also Washington Petroleum & Supply Co. v. Girard Bank, 629 F. Supp. 1224, 1229-30 (M.D. Pa. 1983) (same); Childs v. Federal Reserve Bank, 719 F.2d 812, 814 (5th Cir. 1983) ("Regulation J . . . enables the federal reserve system to perform its check collection and clearinghouse functions . . . ."); Colonial Cadillac, 488 F. Supp. at 285 (remote parties protected). Plaintiffs have failed to prove that the Federal

Reserve Act has any application to the seizure of wire transfers by intermediary banks in forfeiture proceedings.

D. FOREIGN INTELLIGENCE SURVEILLANCE ACT

The Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 et seq. (1988), relied upon by the plaintiffs, has no bearing on this case. The government and banks were overseeing transfers of what the government considered its own funds.

V. STATE LAW CLAIMS

A. NEW YORK RIGHT TO PRIVACY

Plaintiffs claim that the banks' seizure of wire transfers violated their right to privacy. Whether viewed as a common law cause of action or a state

statutory cause of action, plaintiff's complaint fails to state a claim. There is no common law right to privacy in the State of New York. See Young v. United States Dep't of Justice, 882 F.2d 633, 641 (2d Cir. 1989), cert. denied, 493 U.S. 1072 (1990) (citing New York cases); Cohen v. Hallmark Cards, 45 N.Y. 2d 493, 497 n.2 (Ct. App. 1978). Although there is a statutory right to privacy, it is restricted to "cases involving unauthorized use of person's name or likeness." Young, 882 F.2d at 641 (citing N.Y. Civ. Rights Law §§ 50-51).

B. U.C.C. ARTICLE 4-A

Article 4-A of the Uniform Commercial Code was enacted in the State of New York with an effective date of January 1, 1991. Article 4-A for the

first time put into place specific rules for the regulation of funds transfers. It cannot be relied upon in the instant case since the wire transfers were seized in July and August of 1990. The statute does not apply retroactively. See Banque Worms v. BankAmerica Int'l, 568 N.Y.S. 2d 541, 547 (Ct. App. 1991).

In any event, section 4-A-503 of the U.C.C., entitled "Injunction or Restraining Order With Respect to Funds Transfer," recognizes that banks have an obligation to respond to court orders. See Thomas J. Greco, Miscellaneous Provisions: Creditor Process, Injunction, Finality of Account Statement, and Choice of Law, in Bankers Guide, supra, at 56. The Official Comment states that "intermediary banks are protected," meaning that since the

time in transit for funds transfers is brief, intermediary banks cannot be expected to comply with injunctions by creditor. Instead, creditor process should be directed at the originating and receiving banks. The Comment suggests that intermediary banks should not be exposed to liability under article 4-A for declining to stop funds transfers where creditors are seeking the funds. In the instant case, the opposite situation is presented. Plaintiffs wish to hold the intermediary banks liable for agreeing to seize the funds. No such liability is justified. Article 4-A was enacted to enable all parties to funds transfers to "predict risk with certainty, to insure against risk, to adjust operational and security procedures, and to price funds transfer

services accordingly." Official Comment to U.C.C. § 4-A-102. The policies of article 4-A are served by protecting the intermediary banks in forfeiture cases. The courts should hesitate to provide restrictions on their own powers to act swiftly. Cf. Sir Nicolas Browne-Wilkinson, Territorial Jurisdiction and the New Technologies, 25 Israel L. Rev. 145, 147 (1991) ("[T]he speed at which modern technology works is . . . threatening the roots of justice itself."). Finally, even if the U.C.C. were applicable, under the Supremacy Clause a state could not in its regulation of commercial activity inhibit federal law enforcement agencies in applying federal drug laws.

C. CONVERSION

Plaintiffs allege a cause of action

for conversion against the defendant banks. Conversion requires the intentional deprivation of the property of another with intent to retain it permanently. See In re Di Crocco's Estate, 12 N.Y.S. 2d 276, 278 (Surr. Ct. 1939); see, e.g., Shawmut Worcester County Bank v. First Am. Bank & Trust, 731 F. Supp. 57, 59-60 (D. Mass. 1990) (conversion claim may be cognizable, but no conversion under the facts of the case, where bank refused to reverse wire funds transfer); cf. 1 W. Hawkland, F. Leary & R. Alderman, Conversion by Representatives Including Depositary and Collecting Banks, U.C.C. Series § 3-419:05 (1982-86).

No conversion by the banks took place. Although the banks did seize the wire transfers of funds, they promptly

paid the moneys to the Clerk of the Court for safekeeping during the pendency of the litigation. There was never an intention by the banks to take title for themselves or on behalf of anyone else. Cf. Bradley v. Roe, 282 N.Y. 525, 532 (Ct. App. 1940) ("placing property in the custody of the court is, it is plain, not an assertion of dominion over the property to the exclusion of the real owner"). In effect, there were two parties contending they owned the funds -- the government and the claimants. The banks turned the funds over to the courts in a kind of interpleader. In any event, no claim for conversion is possible in forfeiture proceedings, since the defendant property ceases to belong to the claimant at the moment the crime is

committed.

D. THIRD-PARTY BENEFICIARY

Where a contract is formed for the benefit of a third person, that person should have a right of action against a promisee who fails to perform. 2 Samuel Williston, A Treatise on the Law of Contracts § 347 et seq. (3d ed. 1959). Plaintiffs claim that as third-party beneficiaries of a contract between the banks, they have a cause of action against the banks that failed to turn over the funds.

Generally, it is the originator's and not the beneficiary's claims against an intermediary bank which are allowed to stand. See, e.g., Security Funds Servs. v. American Nat'l Bank & Trust Co., 542 F. Supp. 323, 329 (N.D. Ill. 1982) (initiator of transfer could be a

third-party beneficiary). But see Worldwide Sugar Co. v. Royal Bank, 609 F. Supp. 19, 25 (S.D.N.Y.) (no manifest intention to benefit third-party in letter-of-credit arrangement), aff'd, 751 F.2d 373 (2d Cir. 1984). The plaintiffs here have made no showing that they are not only the beneficiaries but also the originators of the wire transfers.

In a forfeiture proceeding, the claims of plaintiffs as beneficiaries of wire transfers are meaningless. As noted above, at the moment a crime is committed the property ceases to belong to the claimant. If it is determined at trial that the funds are traceable to narcotics trafficking, the money will be declared the property of the government ab initio. Then several defenses or

excuses would nullify or bar enforcement of the contract. For example, where the subject matter of a contract is illegal, there is no enforceable contract. Where performance is impossible, it is excused. Cf. United States v. Rod & Reel Fish Camp, 660 F. Supp. 483, 487 (S.D. Miss.) (third parties cannot acquire legal interest in property after date of illegal act since forfeiture occurs as of that time), dismissed, 822 F.2d 57 (5th Cir.), remanded, 813 F.2d 566 (5th Cir. 1987).

As of this moment, probable cause having been found for the seizure of the funds, the claim of the government, not of the plaintiffs, is the only one appropriate for recognition under the third-party contract rubric.

E. NEGLIGENCE CLAIMS

Like the other causes of action, plaintiffs' negligence and gross negligence causes of action stem from the seizure of wire transfers of funds by the defendant intermediary banks. Courts have upheld negligence actions against banks for failing to effectuate electronic funds transfers. See, e.g., Bradford Trust Co. v. Texas Am. Bank-Houston, 790 F.2d 407, 411 (5th Cir. 1986) (negligence claims may stand against bank which honored fund transfer requests of imposter); Compania Anonima Venezolana de Navegacion v. American Express Int'l Banking Corp., 1985 WL 1898, at *5 (S.D.N.Y. 1985) (denying summary judgment because of possible negligence of bank in failing to transmit telex); Security Funds Servs.

v. American Nat'l Bank & Trust Co., 542 F. Supp 323, 327 (N.D. Ill. 1982); Evra Corp. v. Swiss Bank Corp., 522 F. Supp. 820, 828-29 (N.D. Ill. 1981), aff'd in part, vacated in part, rev'd in part, 673 F.2d 951 (7th Cir.), cert. denied, 459 U.S. 1017 (1982); Central Coordinates, Inc. v. Morgan Guar. Trust Co., 494 N.Y.S. 2d 602, 605 (N.Y. Sup. Ct. 1985) (negligence claim cognizable, but none found where it was the plaintiff who was in a better position to avoid the consequences of nondelivery of funds or failure to notify of transfer).

In negligence actions against the banks, as in the third-party contract actions discussed above, it is the originator of the funds transfer who is permitted to maintain the cause of

action. In Evra, for example, the district court held that the sending bank was under a duty to exercise ordinary care to ensure that the funds transfer was effected in a proper and timely manner. 522 F. Supp. at 829.

In the instant case, defendants were not rogue banks seizing funds carelessly or without justification. The intermediary banks were following the precise oral and written instructions of the United States Attorney and the court. Even if the banks can be considered to have a duty to the beneficiaries who were not their customers (a proposition not without controversy), they did not violate the duty of care.

The banks were directed in a showing of apparent authority to seize

the funds. Cf. Clayton Brokerage Co. v. Clement, 87 F.R.D. 569, 570 (D. Md. 1980) (dicta) (bank has no justification for refusing to comply with subpoena issued in civil action). They do not have all the relevant information and cannot make an independent determination of merit.

Moreover, wire transfers occur at such speed, see Delbrueck & Co. v. Manufacturers Hanover Trust Co., 609 F.2d 1047, 1049 n.1 (2d Cir. 1979), that the banks could not, even if they wished, take the time to evaluate orders before deciding whether to comply. Courts recognize that, at least vis-a-vis government action, the nature of the property to be seized may justify swift action. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679

(1974); United States v. 4880 S.E. Dixie Highway, 612 F. Supp. 1492, 1498 (S.D. Fla. 1985) (government may "act first and seek judicial approval later" where movable nature of res suggests exigent circumstances). Where the property is "of a sort that could be removed to another jurisdiction, destroyed, or concealed," Calero-Toledo, 416 U.S. at 679, notice or delay would compromise the government's enforcement goals. Cf. Sir Nicolas Browne-Wilkinson, Territorial Jurisdiction and the New Technologies, 25 Israel L. Rev. 145, 149-52 (1991) (speed of electronic transfers has required the Chancery Court of the High Court in London to expand its jurisdiction over foreign funds).

Generally, it is only where a

residence is at stake that courts recognize the necessity of preliminary notice and hearing before seizure. See United States v. 4492 South Livonia Rd., Livonia, N.Y., 889 F.2d 1258, 1265 (2d Cir. 1989) (contrasting proceeding against home with proceeding against funds; in the latter, government may forgo pre-seizure hearing). But see United States v. 16 Clinton Street, N.Y., N.Y., 730 F. Supp. 1265, 1271-72 (S.D.N.Y. 1990) (seizure of building that contained stores in addition to apartments valid even without notice and hearing). See generally Jack Yoskowitz, The War on the Poor: Civil Forfeiture of Private and Public Housing, 1992 Colum. J.L. & Soc. Probs. (forthcoming). By contrast, electronic funds transfers occur almost instantaneously. The

government must be permitted to act swiftly. There is no time or warrant for any independent evaluation by the banks that would interfere with execution of national forfeiture policy. The claimants can and should look for protection in proceedings involving the government as they are now doing in the All Funds case.

The banks were acting as agents of the court and should be protected. Cf. K/S Norman Agather v. Sea Trade & Constr., Ltd., 767 F. Supp. 60, 62-63 (S.D.N.Y. 1991) (bank was acting as agent of the court when it executed writ of attachment and as such should be protected); Camacho v. Autoridad de Telefonos, 868 F.2d 482, 489-90 (1st Cir. 1989) (semi-public telephone companies immune from liability where

following directives of federal agents). The ability of intermediary banks to rely on court orders without risk of liability is essential to the financial health of this industry. Jeffrey S. Tallackson & Norma Vallejo, International Commercial Wire Transfers: The Lack of Standards, 11 N.C. J. Int'l L. & Com. Reg. 639, 665 (1986).

VI. CONCLUSION

Plaintiffs have failed to state a claim under any state or federal theory. No liability can be found where the banks were in good faith following government orders respecting claimed government funds. There is not the slightest suggestion of bad faith by the banks. Summary judgment for the defendants is granted. The complaint is dismissed.

SO ORDERED.

/s/ Jack B. Weinstein
Jack B. Weinstein
United States District Judge

Dated: Brooklyn, New York
February 27, 1992

THE ELECTRONIC COMMUNICATIONS PRIVACY ACT OF 1986

18 U.S.C. § 2510. Definitions:

(4) "intercept" means the . . . acquisition of the contents of any . . . electronic . . . communication through the use of any electronic . . . device;

(5) "electronic . . . device" means any device or apparatus which can be used to intercept a . . . electronic communication . . . .;

(6) "person" means any . . . individual, partnership, association, joint stock company, trust, or corporation;

(11) "aggrieved person" means a person who was a party to any intercepted . . . electronic communication or a person against whom the interception was directed;

(15) "electronic communication service" means any service which provides to users thereof the ability to send or receive . . . electronic communication;

(17) "electronic storage" means-

(A) any temporary, intermediate storage of . . . electronic communication incidental to the electronic transmission thereof; and

(B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication; . . . .

18 U.S.C. § 2511(1) Except as otherwise specifically provided in this chapter any person who-

(a) intentionally . . . procures any other person to intercept . . . , any . . . electronic communication;

(c) intentionally discloses, . . . to any person the contents of any . . . electronic communication, knowing or having reason to know that the information was obtained through interception of . . . electronic communication in violation of this subsection . . . shall be punished. . . .

18 U.S.C. § 2511(2)(a)(i) . . . except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

18 U.S.C. § 2511(3)(a) Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

18 U.S.C. § 2516(3) Any attorney for the Government (as such term is defined for the purposes of the Federal Rules of Criminal Procedure) may authorize an application to a Federal judge of competent jurisdiction for, and such judge may

grant, in conformity with section 2518 of this title, or order authorizing or approving the interception of electronic communication by an investigative or law enforcement officer having responsibility for the investigation of the offense as to which the application is made when such interception may provide or has provided evidence of any Federal felony.

18 U.S.C. § 2518(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, especially designated by the Attorney General, the Deputy Attorney General, the Associate Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute or that State, who reasonably determines that-

(a) an emergency situation exists that involves-

(i) immediate danger of death or serious physical injury to any person,

(ii) conspiratorial activities threatening the national security interests, or

(iii) conspiratorial activities characteristic of organized crime.

that requires . . . electronic communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such . . . electronic communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has

occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for approval is denied, or in any other case earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any . . . electronic communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

18 U.S.C. § 2520(a) In general.-Except as provided in section 2511(2)(a)(ii), any person whose . . . electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief may be appropriate.

(d) Defense.-A good faith reliance on-

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of; is a

complete defense against any civil or criminal action brought under this chapter or any other law.

18 U.S.C. § 2702. (a) **Prohibitions.**- Except as provided in subsection (b)-

(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service;. . .

(b) **Exceptions.**-A person or entity may divulge the contents of a communication-

(2) as otherwise authorized in section 2517, 2511(2)(a), or 2703 of this title;

(3) with the lawful consent of the originator or an addressee or intended recipient of such communication, . . .: or

(6) to a law enforcement agency, is such contents-

(A) were inadvertently obtained by the service provider; and

(B) appear to pertain to the commission of a crime.

18 U.S.C. § 2703. **Requirements of government access**

(a) **Contents of electronic communications in electronic storage.**- A Government entity may require the disclosure by a provider of electronic communication service of the contents of an electronic

communication, that is in electronic storage in an electronic communication system for one hundred and eighty days or less, only pursuant to a warrant issued under the Federal Rules of Criminal Procedures or equivalent State warrant. A government entity may require the disclosure by a provider of electronic communication service of the contents of an electronic communication system for more than one hundred and eighty days by the means available under subsection (b) of this section.

(c) **Records concerning electronic service** . . . .

(B) A provider of electronic communication service . . . shall disclose a record or other information pertaining to a . . . customer of such service (not including the contents of communications covered by subsection (a)(b) of this section) to a government entity only when the government entity-

(i) uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena;

(ii) obtains a warrant issued under the Federal Rules of Criminal Procedures or equivalent State warrant;

(iii) obtains a court order for such disclosure under subsection (d) of this section; or

(iv) has the consent of the . . . customer to such disclosure.

(e) **No cause of action against a provider disclosing information under this chapter.**-No cause of action shall

lie in any court against any provider of . . . electronic communication service, its officer, employee, agents, or other specified persons for providing information, facilities, or assistance with the terms of a court order, warrant, subpoena, or certification under this chapter.

18 U.S.C. § 2707. Cause of action

(a) Cause of action- Except as provided in section 2703(e), any . . . customer aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity which engaged in that violation such relief as may be appropriate.

(d) Defense.-A good faith reliance on-

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense to any civil or criminal action brought under this chapter or any other law

18 U.S.C. § 2711. Definitions for chapter

As used in this chapter-

(1) the terms defined in section 2510 of this title have, respectively, the definitions given in that section.

Supreme Court, U.S.
FILED
JUN - 6 1994
OFFICE OF THE CLERK

No. 93-1785

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ORGANIZACION JD LTDA., and
MANUFACTURAS JD LTDA.,

Petitioners,

vs.

UNITED STATES OF AMERICA, DRUG ENFORCEMENT ADMINISTRATION, BANCO ATLANTICO, and THE BANK OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER PETITIONERS MAY HOLD INTERMEDIARY BANKS INVOLVED IN ELECTRONIC FUNDS TRANSFER ("EFT") TRANSACTIONS LIABLE FOR ALLEGED VIOLATIONS OF THE RIGHT TO FINANCIAL PRIVACY ACT, WHEN THE PETITIONERS ARE NOT "CUSTOMERS" OF THE BANKS WITHIN THE MEANING OF THE ACT.

II. WHETHER INTERMEDIARY BANKS THAT PROVIDED INFORMATION TO THE GOVERNMENT CONCERNING EFT'S MAY BE HELD LIABLE FOR ALLEGED VIOLATIONS OF THE ELECTRONIC COMMUNICATIONS PRIVACY ACT, WHEN THE BANKS ACTED IN GOOD FAITH COMPLIANCE WITH *IN REM* WARRANTS AND ADMINISTRATIVE SUBPOENAS, WERE PARTIES TO THE EFT COMMUNICATIONS AND DID NOT "INTERCEPT" THEM.

III. WHETHER THE SECOND CIRCUIT PROPERLY DETERMINED THAT PETITIONERS CANNOT MAINTAIN A CAUSE OF ACTION FOR BREACH OF A THIRD-PARTY CONTRACT BASED UPON THE BANKS' ALLEGED FAILURE TO EFFECT EFT'S NAMING PETITIONERS AS BENEFICIARIES, WHEN PETITIONERS HAD NO RELATIONSHIP WITH THE BANKS AND THE BANKS SEIZED THE FUNDS AND PAID THEM INTO COURT PURSUANT TO COURT ORDERS AND RELATED INSTRUCTIONS FROM THE UNITED STATES ATTORNEY.

LIST OF PARTIES

Pursuant to Rule 24.1(b) of the Supreme Court of the United States, the following is a list of parties to the Petition:

The Petitioners are Organizacion JD Ltda. and Manufacturas JD Ltda.

Respondents are Banco Atlantico, S.A. and The Bank of New York (collectively, the "Banks").

Pursuant to Rule 29.1 of the Supreme Court of the United States, The Bank of New York identifies the following parent companies, subsidiaries and affiliates:

> *The Bank of New York Company, Inc.*, ARCS Mortgage Holdings, Inc., ARCS Mortgage, Inc. (California), Armot Corporation, Armot Corporation of Washington, B.N.Y. Holdings (New Jersey) Corporation, The Bank of New York, N.A., NLB Investment Company, Inc., Natcom Investments, Inc., B.N.Y. Holdings (Delaware) Corporation, The Bank of New York (Delaware), The Bank of New York Overseas Finance N.V., Lease Equities (Delaware) Corporation, Lease Equities (Texas) Corporation, BNY Business Center, Inc., BNY Capital Corporation, BNY International Trade, Inc., BNY Trade Insurance, Ltd., BNY One Leasing Corporation, BNY Personal Brokerage, Inc., Capital Trust Company, Eastern Trust Company, Irving Financial Centers, Inc., North American Bancorp., Inc., The Bank of New York Life Insurance Company, Inc., The Bank of New York Trust Company, The Bank of New York Trust Company of California, The Bank of New York Trust Company of Florida, N.A.;
>
> *The Bank of New York*, BNY Associates Incorporated, BNY Leasing Corporation, Airlease Incorporated, Airlease Foreign Sales Corporation, BNY Capital Funding Corp., BNY New Amsterdam, Inc., Flugel FSC,

Ltd., BNY Waterworks, Inc. (99.09%), BNY Wings, Inc., BNY Wings FSC, Inc., ILC Gear Inc., IRE-1, Inc., IRE-AC, Inc., New GSM Holding Corporation, IRE-Aurora, Inc., IRE-SC, Inc., IRE-BC, Inc., IRE-SB, Inc., IRE-WWP, Inc., Irving Leasing Foreign Sales Corporation, ENMASS, Inc., Flamingo Plaza Realty, Inc., Forty-First Street Holdings, Inc., GH Holdings Inc., Green Island Realty, Inc., Hamlet Holdings, Inc., Horizon at Wayne, Inc., Hulfish Beverage Corp., Hull Junction Holding Corp., IDC (Queens) Corp., Jefferson Plaza Properties Inc., Karpen Properties, Inc., Village Beverage Co., Inc., Landmark Tower, Inc., Linroad Holding Corp., Linroad Realty, Inc., Longtuco Realty Corporation, MacArthur Holdings, Inc., Miami Kendall Properties, Inc., Mid-Plaza Holdings, Inc., MTD Shipping Inc., Newmex Holding, Inc. NO FRILLS, Inc., Odysseus Properties, Inc., One Wall Street Corporation, OVD Holding Inc., Pacshore Holding, Inc., PBP Holdings, Inc., Plymouth Holding Inc., Pohio Holding Inc., PresPark, Inc., Rivohio Holding Inc., Robin Investgments, Inc., Station Mall, Inc., Techcen, Inc., Techcen II, Inc., The Fourten South Broadway Corporation, Valley Premises, Inc., Venetia Realty, Inc., VHPL II, Inc., Walnut Hill Center Corporation, Willowtrail Holding Inc., Wolham Holdings, Inc., Wolpheas Holdings, Inc., Wolstat Holdings Inc., WP Hotel, Inc., Island Waterworks, Inc. (90%), ITC Leasing Corporation, Northern Waterworks, Inc. (99.09%), Waterwheel, L.P. (Partnership) (99%), BNY Generator Lessor, Ltd., BNY Turbine FSC, Ltd., BNY Turbine FSC II, Ltd., BNY Turbine FSC III, Ltd., BNY Turbine FSC IV, Ltd., JCPL Leasing Corp., BNY Financial Corporation, BNY Information Services, Inc., BNY International Financing Corporation, BNY Special Nominees No. 1 Limited, The Bank of New York (Nominees), Ltda., BNY (Nominees) Limited, The Bank of New York Assessoria E. Consultoria, Ltd., The Bank of New

York Capital Markets Limited, The Bank of New York Trust Company (Cayman), Limited, Banco Crediban-co, S.A. (50%), BK Investments, C.A., BNY Australia Limited, BNY Australia Finance Holdings Limited, BNY Worldwide Services Co., Ltd., Compania Dowson, S.A., Irving Trust Company (Nominees) Ltd., Wing Hang Bank, Limited (49%), Banco Weng Hang S.A.R.L., BNY One Capital Corporation, The Bank of New York Commercial Corporation, The Bank of New York Consumer Leasing Corporation, The Bank of New York, S.A., ITCMED, Inc., Sloane Holdings, Inc. (66-2/3%), EPHCO, Inc., LCHCO, Inc., SCHCO, Inc., XYXYXY *Corporation*, *Real Estate Subsidiaries*, 65th Street Townhouse, Inc., 200 Lombard St., Corp., Allohio Holding Inc., Bogohio Holding Inc., Burbank Holdings Inc., Ca-Tar Properties, Inc., Claymont Holding, Inc., Cronos Properties, Inc., Design Center Bus Company, Inc., Eight Stamford Realty Corporation, Empark, Inc., Empro Properties, Inc.

Banco Atlantico has no parent companies or subsidiaries.

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JURISDICTION

Petitioners purport to base jurisdiction on 28 U.S.C. §1254(1).

STATUTES INVOLVED

THE RIGHT TO FINANCIAL PRIVACY ACT

12 U.S.C. § 3401: Definitions

(4) "person" means an individual or a partnership of five or fewer individuals;

(5) "customer" means any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name;

12 U.S.C. § 3413: Exceptions

(a) **Disclosure of financial records not identified with particular customers**

Nothing in this chapter prohibits the disclosure of any financial records or information which is not identified with or identifiable as being derived from the financial records of a particular customer.

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, AS AMENDED BY THE ELECTRONIC COMMUNICATIONS PRIVACY ACT OF 1986

18 U.S.C. § 2511: Interception and disclosure of wire, oral, or electronic communications prohibited

(2) (c) **It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire,**

oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

18 U.S.C. § 2520: Recovery of civil damages authorized

(d) Defense. – A good faith reliance on –

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization . . .

. . .

is a complete defense against any civil or criminal action brought under this chapter or any other law.

18 U.S.C. § 2703:

(e) No cause of action against a provider disclosing information under this chapter.— No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, or certification under this chapter.

18 U.S.C. § 2707: Civil action

(d) Defense.- A good faith reliance on -

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization . . .

. . .

is a complete defense to any civil or criminal action brought under this chapter or any other law.

21 U.S.C. § 881: **Forfeitures**

(b) **Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims; issuance of warrant authorizing seizure**

Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims . . ., except that seizure without such process may be made when -

. . .

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture . . . .

No. 93-1785

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ORGANIZACION JD LTDA., and
MANUFACTURAS JD LTDA.,

Petitioners,

vs.

UNITED STATES OF AMERICA, DRUG ENFORCEMENT ADMINISTRATION, BANCO ATLANTICO, and THE BANK OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

The Banks respectfully submit this Brief in Opposition to Petition No. 93-1785.

A. THE UNDERLYING ACTIONS

This case is closely related to two actions that were before the Honorable Jack B. Weinstein in the United States District Court for the Eastern District of New York, each of which is

in a different procedural posture: 1) *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993) ("*All Funds*")[1]; and 2)*Manufacturas Internacional, Ltda. v. Manufacturers Hanover Trust Co., and Consolidated Cases*, 792 F. Supp. 180 (E.D.N.Y. 1992), appeal pending No. 92-7360 (2d Cir. 1992) ("*Consolidated Bank Cases*").

1. *The All Funds Case*

All Funds is a civil forfeiture action brought by the United States, in which Petitioners and others appeared as claimants. A trial by jury resulted in a unanimous verdict forfeiting approximately $10,000,000 to the United States. As described by the Second Circuit, these forfeitures:

> arose out of an international effort to impede the drug-trafficking and money-laundering activities of the Cali cartel . . . The Cartel uses bank accounts throughout the United States, Europe, and Central and South America to store and move its narcotics proceeds. Its funds are moved through various international banks by means of electronic funds transfers (EFTs) for ultimate deposit into Colombian bank accounts.

The jury also returned approximately $300,000 to two of the claimants — the present Petitioners Organizacion JD Ltda. and Manufacturas JD Ltda. — which the jury determined had met their burden of proving that the funds they claimed were not traceable to illegal activities.

By memorandum decision dated August 5, 1992, the District Court denied the claimants' motion for either a new trial or judgment as a matter of law. The Second Circuit affirmed the District Court decision on April 2, 1993, and subsequently denied a petition for rehearing. On March 21, 1994, the Supreme Court denied a petition for a writ of certiorari. The Banks were not parties to *All Funds*.

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[1] Petitioners refer to the *Daccarett* decision as *U.S. v. All Funds on Deposit at Merrill Lynch, Pierce Fenner & Smith, Inc.*, as the case bore that caption in the District Court. To avoid confusion, the case will be referred to here as "*All Funds*".

2. *The Consolidated Bank Cases*

In *Consolidated Bank Cases*, certain claimants in *All Funds* brought actions against the Banks. These actions were consolidated and subsequently dismissed by the United States District Court for the Eastern District of New York pursuant to the grant of summary judgment in favor of the Banks. Following the filing of a Notice of Appeal, appellants, stipulated to withdraw and not reinstate their appeal in *Consolidated Bank Cases* until final resolution, including all appeals, of *All Funds*. Subsequently, the Second Circuit denied appellants' premature motion to reinstate their appeal. Following the denial of the petition for a writ of certiorari in *All Funds*, appellants reinstated their appeal in *Consolidated Bank Cases*. Appellants' brief is to be filed by June 14, 1994.

B. BACKGROUND

The Banks are banking institutions that received court orders and instructions from the United States Attorney for the Eastern District of New York to attach the proceeds of certain electronic funds transfers ("EFTs") pursuant to Warrants of Arrest *In Rem* issued in the *All Funds* civil forfeiture action. Petitioners, two of the claimants in *All Funds*, were the ultimate beneficiaries of certain EFTs attached by the United States.

In July and August 1990, the Banks acted as intermediary banks for the EFTs and complied with court orders and instructions from the United States Attorney to attach the EFT proceeds and pay them into Court. Neither of the Petitioners maintained accounts at the Banks. Rather, Petitioners were customers of Colombian banks which, in turn, maintained correspondent banking relationships with one or more of the Banks. The Banks were instructed by EFT communications to credit funds to the Colombian banks' correspondent accounts in New York. The Colombian banks would, in turn, advise their customers of the credits to their accounts.

Before the Banks received the EFT communications, on or about July 18, 1990, the United States District Court for the

Eastern District of New York issued a Supplemental Warrant for Arrest of Articles *In Rem*, based upon a Third Amended Complaint in *All Funds*, commanding the Banks to attach "all funds transferred to, through and by" the Banks to Colombian banks for the ultimate benefit of certain named beneficiaries and "all related entities and individuals." The United States Attorney's Office had probable cause to believe that these funds represented laundered drug money being transferred from Europe via New York to Colombia.[2]

The Banks, which were required to comply with lawful court orders, had no information with which to determine whether any particular EFT beneficiary was a "related" entity. In order to identify the "related" entities, the United States Attorney instructed the Banks to provide information concerning each EFT directed to accounts maintained with the Banks by the Colombian banks. The United States Attorney identified which beneficiaries were related entities and ordered the Banks to attach specific EFT proceeds. The Banks, in a good faith effort to comply with the warrants of arrest, followed the government's orders.

Over the course of the next several weeks, from July 18, 1990 through August 3, 1990, the United States Attorneys' Office for the Eastern District of New York supplemented these instructions and orders with the Fourth, Fifth, Sixth and Seventh Amended Complaints together with accompanying Supplemental Warrants of Arrest *In Rem*. All of the claimants were specifically identified as entities whose funds were to be attached.

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[2] On May 13, 1991, Magistrate Judge A. Simon Chrein found that the government had shown in this civil forfeiture proceeding probable cause "to believe that the defendant funds constitute the proceeds of narcotics trafficking and/or money laundering" under 21 U.S.C. § 881(i) and 18 U.S.C. § 981(g).

Thereafter, in May 1991, United States District Judge Jack B. Weinstein held a three day evidentiary hearing in which he also determined that there was probable cause to believe the funds were forfeitable.

On July 25, 1990, the Banks were served with a "Summons to Show Cause Why Intangible Property Should Not Be Paid Into Court." This Show Cause Order covered both the funds described in the Warrants of Arrest, and "any and all funds subject to the instant action which are hereinafter deposited, transferred, identified, located, frozen or otherwise discovered or acquired . . . ." The Banks, in compliance with the order, segregated the EFT proceeds and paid them into Court.

C. PROCEDURAL HISTORY

On August 5, 1992, after the conclusion of the *All Funds* trial, the two claimants whose funds were not forfeited, Organizacion JD Ltda. and Manufacturas JD Ltda., commenced the *Organizacion JD* action. Banco Atlantico, The Bank of New York and the United States defendants moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6) in November 1992. The District Court granted the motions.

Organizacion JD Ltda. and Manufacturas JD Ltda. appealed from the dismissal to the United States Court of Appeals for the Second Circuit. While the appeal was pending in the Second Circuit, Organizacion JD Ltda. and Manufacturas JD Ltda. petitioned for a Writ of Certiorari to the Supreme Court of the United States. On March 21, 1994, the Supreme Court of the United States denied Petitioners request for certiorari.

On February 24, 1994, after the Banks filed their Joint Brief in Opposition to the petition for certiorari, the Second Circuit rendered its decision in *Organizacion JD*. The decision affirmed the dismissal of all counts against the Banks, but reversed and remanded the portion of the District Court's decision that dismissed Petitioners' claims against the United States Government under 18 U.S.C. § 2707(a) for alleged violations of the Electronic Communications Privacy Act, 18 U.S.C. §§ 2701-2710 ("ECPA"). (Pet. App. B-19-20).

SUMMARY OF THE ARGUMENT

The Second Circuit correctly decided the case below. It determined that the Petitioners were not "customers" within the meaning of the Right to Financial Privacy Act 12 U.S.C. § 3401 *et seq.* ("RFPA") and, therefore, had no claims against the Banks under the provisions of the RFPA.

In addition, no statutory "interception" occurred within the meaning of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (the "Omnibus Act"), as amended by the ECPA. The Banks, as the intended recipients of EFT communications properly received the communications in the ordinary course of their business and complied in good faith with court orders and instructions from the United States Attorney in providing information concerning the EFTs. The Second Circuit properly held that the Banks incurred no liability for having done so.

As to Petitioners' breach of contract claims against the Banks, the Second Circuit correctly held that, even if Petitioners could establish that they somehow were third party beneficiaries of the EFT agreements between the Banks and their correspondent Colombian banks, which they cannot, there could be no breach of contract claim because the intervening government actions in ordering the seizures of the EFT's rendered any enforceable contract impossible to perform.

Therefore, the Petition does not raise any issues that merit review by the Court.

REASONS FOR DENYING THE WRIT

I.

THE SECOND CIRCUIT CORRECTLY DECIDED THE BANKS DID NOT VIOLATE THE RIGHT TO FINANCIAL PRIVACY ACT

The Second Circuit properly held that Petitioners lacked standing under the RFPA. Petitioners incorrectly alleged below that the Banks violated the RFPA by (i) intercepting and holding a wire transfer communication; and (ii) providing government officials with information regarding the EFTs.

The RFPA provides a private right of action against a financial institution only to "customers" of that institution, 12 U.S.C. § 3413(a). Under the RFPA, a customer is any individual or partnership of five or fewer individuals who utilized or is utilizing any service of a financial institution in relation to an account maintained in the person's name. 12 U.S.C. § 3401(4),(5).

Neither of the Petitioners was a customer of the Banks and neither maintained an account with the Banks in its own name. In addition, because Petitioners are neither individuals nor partnerships[3] of five or fewer individuals, Petitioners do not fit within the narrow definition of persons protected by the RFPA. *See Securities & Exch. Comm'n v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 745 (1984) (RFPA "carefully limits the kinds of customers to whom it applies"). The record is explicit that the seized funds were to be credited to the accounts of designated Colombian banks. Even after the funds were seized they were held pursuant to the warrants of arrest and not in accounts maintained by Petitioners at the Banks. *See Ridgeley v. Merchants State Bank*, 699 F. Supp. 100, 102 (N.D. Tex. 1988); *Duncan v. Belcher*, 813 F.2d 1335, 1338-39 (4th Cir. 1987).

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[3] Despite Petitioners' contention that they are "limited partnerships," their motion pursuant to Rule 44.1 of Federal Rules of Civil Procedure, dated September 15, 1992 and filed in *Organizacion JD*, shows that under Colombian law they are in fact "limited liability companies."

The Second Circuit correctly held that the RFPA can be enforced only by customers; since Petitioners are not customers, they have no standing under the RFPA, and cannot rely on it to pursue a claim against the Banks. (Pet. App. B-15-16). Accordingly, the RFPA does not provide a ground for granting the Petition.

II.

THE SECOND CIRCUIT CORRECTLY DECIDED THAT THE BANKS DID NOT VIOLATE THE ELECTRONIC COMMUNICATIONS PRIVACY ACT BY COMPLYING WITH COURT ORDERS AND INSTRUCTIONS FROM THE UNITED STATES ATTORNEY TO PROVIDE INFORMATION CONCERNING EFT COMMUNICATIONS DIRECTED TO THE BANKS

Petitioners also fail to articulate why the Second Circuit's interpretation of the term "interception" merits review by this Court, especially given that the Banks acted pursuant to lawful Warrants of Arrest. It is indisputable that the Banks did not violate the ECPA.

A. As a Matter of Law, the Banks Could Not Have Intercepted Communications Related to the EFTs

Petitioners claim that the Banks violated the ECPA by illegally intercepting EFT communications and by providing to the government information contained in those communications. This claim is seriously flawed. No interception occurred here.

The statute defines the term "interception" as "the aural or other acquisition of contents of any wire, electronic, or oral communications through the use of any electronic mechanical or other device." 18 U.S.C. § 2510(4); *See United States v. Andonian*, 735 F. Supp. 1469, 1472 (C.D. Cal. 1990) (the ECPA applies to "communications which pass from their origin to the intended recipient and are subject to third-party intervention"). The Banks, as intended recipients of the communications, did

not "intercept" but properly received the communications in the ordinary course of their business. No statutory interception did occur or could have occurred here. *See* 18 U.S.C. § 2510(4).

B. The Banks Are Entitled to the Court's Protection

1. *The Banks Acted Under Color of Law*

Even if the Court were to find that the Banks intercepted a communication, no liability would result because that conduct falls squarely within an express exception to the provisions of the Omnibus Act. Section 2511(2)(c) of the Omnibus Act provides,

> It shall not be unlawful under this chapter for a person *acting under color of law* to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception. (emphasis added).

The Banks took no independent steps with respect to the EFT communications; they simply abided the court orders and directives of the United States Attorney. Accordingly, even if the Court found that an interception occurred, the Banks' actions "under color of law" would preclude any liability under the Omnibus Act. *See United States v. Barone*, 913 F.2d 46, 48-49 (2d Cir. 1990).

2. *The Banks Acted in Compliance with Court Orders and are Absolved from any Liability*

Even if the Banks were providers of electronic communication services within the meaning of the ECPA, as Petitioners allege, the Banks' compliance with the Warrants of Arrest absolves them of any liability. 18 U.S.C. § 2703(e); 18 U.S.C. § 2520(d)(1); and 18 U.S.C. § 2707(d)(1).

As set forth in 18 U.S.C. § 2703(e):

> No cause of action shall lie in any court against any provider of wire or electronic communications service

> . . . for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena or certification under this chapter.

Similarly, 18 U.S.C. §§ 2520(d)(1) and 2707(d)(1), the statutes authorizing civil actions for interception and disclosure of electronic communications, each provide a complete defense to any action when there is a good faith reliance on a "court warrant or order . . . or a statutory authorization." *See also* 18 U.S.C. § 2511(2)(a)(ii). As the Second Circuit properly decided, the Banks acted in good faith reliance on both warrants and court orders and the statutory authorization granted the Attorney General under 21 U.S.C. § 881(b)(4), and are entitled to the protection of the Court for having done so. ("The Banks should face no liability where they intentionally acted within their perceived legal obligations by following the instructions of the United States Attorney and the court").

III.

PETITIONERS HAVE NO THIRD-PARTY CONTRACT CLAIMS AGAINST THE BANKS

Even if Petitioners were third-party beneficiaries of some contract, the Warrants of Arrest and instructions of the United States Attorney, which required the Banks to seize the transferred funds, made the performance of such a contract impossible.

As the Second Circuit stated:

> Irrespective of whether plaintiffs can even make out a claim as a third-party beneficiary under New York law, the private intermediary banks cannot be subject to a damage action because the intervening government actions in ordering the seizures of the EFTs rendered any enforcement contract impossible to perform.

(Pet. App. B-18).

As a matter of law, impossibility of performance of a contract excuses the non-performing party from liability for breach

of that contract. *See RSB Mfg. Corp. v. Bank of Baroda*, 15 Bankr. 650 (S.D.N.Y. 1981) ("[t]he defense of impossibility extends to judicial action as long as the party seeking to be excused has not caused or failed to prevent the judicial action.")

A. Petitioners Have no Privity with the Banks

Even if performance of a contract were not impossible, Petitioners' claims for breach of a third-party contact must fail because they are not customers of the Banks. Under New York law, a third party may recover for breach of contract only by establishing (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit, and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate assumption by contracting parties of duty to compensate him if the benefit is lost. *Burns Jackson Miller, Etc. v. Lindner*, 59 N.Y.2d 314, 464 N.Y.S.2d 712, 451 N.E.2d 459 (1983); *Rey v. Penn Shipping Co.*, 277 F.2d 905 (2d Cir. 1960) *cert. denied*, 364 U.S. 829; *Penn Steel Co. v. N.Y. City Ry.*, 198 F. 721, 749 (2d Cir. 1912). Petitioners fail to meet the last two criteria.

Petitioners maintain no accounts at the Banks. The only relationship between Petitioners and the Banks is that the Banks were intermediary banks for EFTs, of which Petitioners were the ultimate beneficiaries. Only the beneficiary banks (which would have banking relationships with Petitioners) could credit the Petitioners' accounts with the funds from the EFTs. Petitioners are strangers to the Banks and the Banks owe them no duty or obligation to defy orders of the Court or government agents.

Petitioners contend that an EFT is a "series of transactions. With the completion of each payment order, a bank becomes obligated to pay funds *to the next link in the chain* . . . ." (Petitioners' Br. at 37, emphasis added). Accepting this description as correct, the only relationship relevant to the issues raised here is the banking relationship that the Banks maintain with the next bank in the EFT chain — here, the beneficiary banks with which the Banks maintain correspondent banking relationships.

Generally, in a correspondent banking relationship, a commercial bank such as BNY or Banco Atlantico agrees to provide certain services such as letters of credit, time deposits, bank accounts and collections of checks to another bank.

Petitioners failed to show that they were a direct and intended beneficiary and that the Banks and the beneficiary banks intended to confer some benefit on them in entering into a correspondent banking relationship.[4] As Petitioners utterly failed to meet this burden, the Second Circuit properly dismissed their third-party contract claims.

Petitioners have not shown that the Banks were even remotely aware of their existence until their names appeared on the EFT communications as ultimate beneficiaries. *See Ahmed v. National Bank of Pakistan*, 572 F. Supp. 550, 553-54 (S.D.N.Y. 1983) (plaintiffs could not be intended third-party beneficiaries when defendant bank had no dealings with or knowledge of plaintiffs). Their claims for breach of a third-party contract were therefore properly dismissed.

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[4] Petitioners contend that, by virtue of Regulation J, 12 C.F.R. part 210, there is some contractual relationship between the Banks and the Federal Reserve system to which they are third party beneficiaries (Petitioners' Br. at 34-35). Even if Regulation J could be described as a "contract," nothing in those regulations proscribes a receiving bank from complying with Court Orders or the instructions of the United States Attorney not to complete a funds transfer. *Cf. Manufacturas*, 792 F. Supp. at 193 ("[p]laintiffs failed to prove that the Federal Reserve Act has any application to the seizure of wire transfers by intermediary banks in forfeiture proceedings"). Indeed, the only "agreement" of a receiving bank under Regulation J is to allow the Federal Reserve Bank to credit its account. 12 C.F.R. § 210.29.

CONCLUSION

For the foregoing reasons, the Petition for writ of certiorari should be denied.

Dated: June 6, 1994

Respectfully submitted,

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